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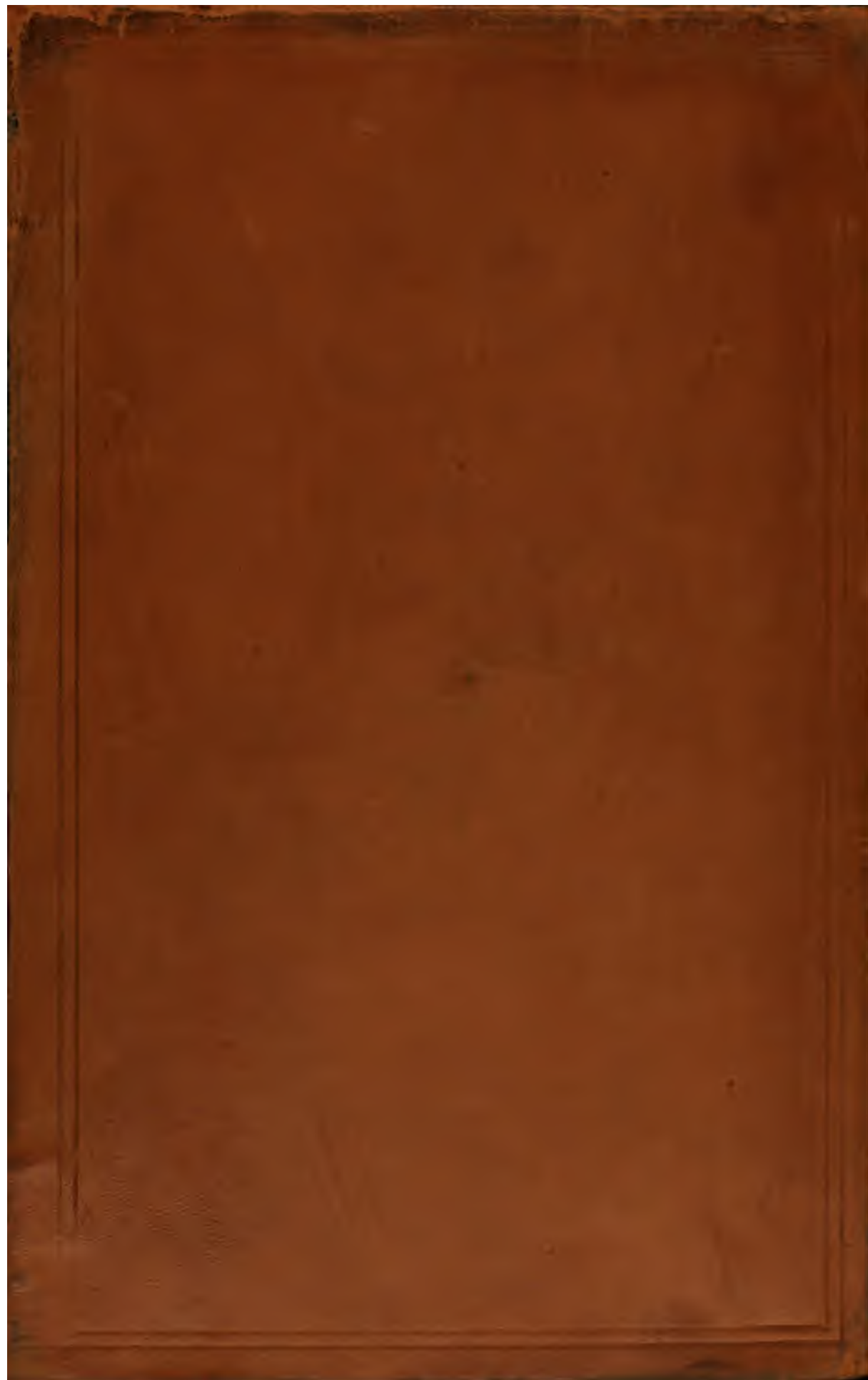
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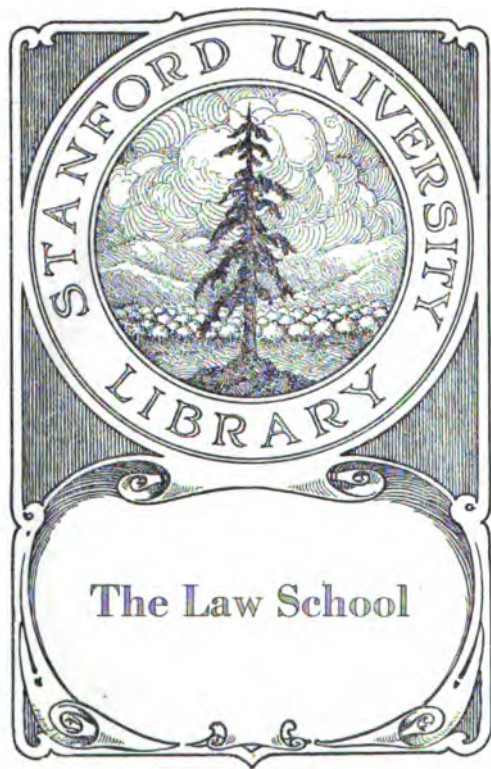
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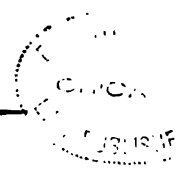
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AMERICAN
RAILROAD AND CORPORATION
REPORTS.

**BEING A COLLECTION OF THE CURRENT DECISIONS OF THE COURTS OF
LAST RESORT IN THE UNITED STATES PERTAINING TO THE LAW
OF RAILROADS, PRIVATE AND MUNICIPAL CORPORATIONS, IN-
CLUDING THE LAW OF INSURANCE, BANKING, CAR-
RIERS, TELEGRAPH AND TELEPHONE COMPANIES,
BUILDING AND LOAN ASSOCIATIONS, ETC.**

EDITED AND ANNOTATED BY

JOHN LEWIS,

AUTHOR OF "A TREATISE ON EMINENT DOMAIN IN THE UNITED STATES."

VOLUME IV.

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PREFACE.

In the present volume, immediately following the cases reported, we have given, in parentheses, the name of the court making the decision and the date of filing the opinion, instead of a reference to the reporters and official reports, where the opinions may be found, as in former volumes. A reference to the source from which each case is taken, is placed in a foot-note at the end of the case, followed by a reference to the official reports when possible. In this connection we acknowledge the courtesy of the West Publishing Company in permitting such use of the editorial matter in their various reporters as we may see fit to make. We have availed of this privilege for the first time in the preparation of the present volume.

THE EDITOR.

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AMERICAN RAILROAD AND CORPORATION REPORTS.

MILLER ET AL. V. SOUTHERN PAC. R. Co.

(Supreme Court of Oregon, Jan. 6, 1891.)

1. RAILROAD COMPANIES. ACCIDENT TO EMPLOYE. MASTER AND SERVANT. Any duty which the master is required to perform for the safety and protection of his servants cannot be delegated to any servant of any grade, so as to exempt the master from liability to a servant who has been injured by its non-performance.

2. GENERAL DUTIES OF COMPANY TO ITS EMPLOYEES. It is the duty of a railroad company to keep its road-bed and track, rolling stock, machinery and appliances in good and safe condition, to cause frequent and thorough inspection of these as can be done consistently with the conduct of its business, for the purpose of discovering any defects that may occur from accidental causes, or the effects of wear and tear or the progress of decay, to exercise care in the selection of its servants and in their retention in its service, and to adopt such rules and regulations as are calculated to guard against accidents, and to make the servants in its employ reasonably safe.

3. DUTIES OF SWITCHMAN. WHETHER VICE-PRINCIPAL. It is the duty of a switchman to operate the switch, and see that it properly adjusts the rails, so that the trains may pass with safety. The act he performs involves no duty of construction or repair, or other duty in regard to the switches of the road, if out of repair or unfit for use, whether by wear or tear, or by the criminal interference of strangers, than to promptly notify the company of its condition, so that it may be repaired, or its place supplied.

4. RELATION OF FELLOW-SERVANTS, HOW DETERMINED. It is the law, in the absence of express contract, that establishes the relation of the parties creating him agent or representative of the master who performs duties which

the law itself makes it incumbent on the master to perform, and not the rules or regulations of the company designed for the guidance of its servants, and to secure reasonable safety in the conduct of its business.

5. SWITCHMAN AND ENGINEER ARE FELLOW-SERVANTS. The co-operation of the switchman is necessary to the successful management of the trains, and employes upon the train in the common service assume the risk of the negligent discharge of his duty.

6. EVIDENCE: Where the trial court refused to admit as evidence the indictment and judgment of the conviction of one W. A. Hill for the killing of the plaintiff's intestate by disarranging a switch on the defendant's railroad, and certain confessions he had made to one Dr. Davis, upon the ground that such conduct was *res inter alios acta* — held, no error.

A PPEAL from circuit court, Marion county, R. P. Boise, judge.

Bronaugh, Northrup & McArthur for appellant. *R. and E. B. Williams* and *Charles H. Carey* for respondents.

PER CURIAM. This is an action to recover damages, brought by the plaintiff, as administratrix of the estate of her husband, J. W. Miller, deceased, under section 371, Hill's Code, for the death of the intestate, who was killed on the night of the 28th of July, 1889, by the derailing of an engine, of which he was engineer, in the employ of the defendant. His death is alleged to have been caused by the negligence of the defendant and its agents in suffering a certain switch at Lebanon Junction, on the line of the road, to be out of order, so that in operating it the rails did not form a continuous line, whereby the engine was thrown from the track, and he was so badly injured that he died the next day. After denying these facts, the defendant alleges as a separate defense (1) that the derailing of the engine was caused by one W. A. Hill, who, immediately before the engine was thrown from the track, criminally, and without the knowledge of the defendant, broke and disarranged said switch, whereby the rail was thrown out of line, so that the engine in passing at that place was derailed, and the intestate mortally injured; (2) that if any agent or servant of the defendant was guilty of negligence which caused the injury of the plaintiff's intestate, he was a fellow-servant of such intestate, Miller; and (3) that the injury was caused by the criminal act of one W. H. Hill, a stranger to defendant, combined with the negligence of said Miller and his fellow-servants. Issue being joined on this, a trial was had, which resulted

in a verdict and judgment for the plaintiff, and from which this appeal is brought. At the close of the evidence for the plaintiff, the defendant interposed a motion for a judgment of nonsuit, which, the trial court refusing, is assigned as error.

The evidence tended to show that the overland train, on which the plaintiff's intestate was acting as engineer of the locomotive drawing such train, was derailed at a switch about one and a half miles south of Albany, a little after nine o'clock on the evening of Sunday, July 28, 1889; that the locomotive was overturned, and Miller was caught in or under it, whereby he was so badly bruised and scalded by the escaping steam that he died the next day; that the train reached Albany about 8:40 o'clock, P.M., and stopped there twenty minutes for supper; that shortly after its arrival the Lebanon locomotive, in charge of Conductor Huston, left Albany on the main track to the Lebanon switch. On reaching the switch, Huston's locomotive was halted until a brakeman aboard of it could throw the switch, and let his locomotive pass from the main track to the Lebanon branch track; that it was after dark, necessitating the use of a lantern, and that when he attempted to move the switch, so as to throw the rails in position for the passage of the locomotive, something interfered with the shoving over of the switch-rails, whereupon, taking his lantern to discover the cause of it, he found clamped between the rails a stone, and that to remove it he had to return to the switch-lever, and throw it back into the same position it had occupied before he touched it, but that, in doing so, he observed the rails came properly back into place for the main line; that he went and threw the stone from the track, and then re-turned the switch-lever, without further difficulty, into position for the passage of the locomotive from the main track to the Lebanon branch track; that the locomotive passed through, and he then threw the switch back into proper position, for the passage of trains on the main track, but that he did not observe at the time, whether or not the rails obeyed the switch, and came back into line with the rails of the main track, but supposed that they did. Huston, however, who was on the locomotive at the time, and about twenty feet distant from the switch, testified that he did not notice and observe that the rails at that time came into line with the rails of the main track; that he was able to observe the

movements of the rails by the brakeman's lantern, which shone on the bright surface of the rails; that the switch was then locked by the brakeman, who remounted the locomotive, and it moved on toward Lebanon. In a few minutes after this Miller came on the main track with his engine and train from Albany, and when within about fifty feet of the switch observed that the switch rail was not in line with the main-track rail adjoining to and next beyond it on the south, but it was then too late to stop the train, and the locomotive was derailed, whereby Miller was so badly injured that he died the next day. The cause of the accident was due to the fact that a draw-bar of the switch was out of place; the linch-pin being out, so that the rails had not come back to place when the brakeman had adjusted the switch after the engine going to Lebanon passed it. The construction of the switch was such that two iron rods attached to it passed from it through the switch-rail, one of the rods pushed the T-rail over into line with the rails on the branch line when desired, and the other rod pulled the rail back, when it was necessary, into line with the rails on the main track. Each rod had an iron eye or ring on the end next to the switch, which fitted into a shank, and was held into it by an iron pin or split key, passing through a hole in the outer end of the shank. An iron washer worked between the eye of the rod and the split key, so that the eye of the rod could not be slipped off of the shank without first drawing the split key out of its hole, and removing the washer from off the shank. When the switch was examined soon after the accident it was found that the switch indicated, or at least appeared to have been tampered with prior to the accident, either before or after the Lebanon locomotive passed through the switch. The rod which should have pulled the switch-rail back into line with the rails on the main track had been taken off of its shank, and dropped to the ground. The split pin which had held that rod in place on its shank was not found, but the washer which worked between the split pin and the rod's eye had been put back on the shank after the rod was removed off it. There is no other testimony than this tending to show how long the switch had been so disarranged before the accident occurred, or that the defendant company knew, or by the exercise of reasonable diligence ought to have discovered, that the switch had been tampered with, or

was not in proper working order, before the time when the accident occurred.

Numerous exceptions were taken to instructions asked and refused and to instructions given by the trial court, and to the refusal to admit certain testimony relative to the confession and conviction of one W. A. Hill for tampering with and disarranging the switch which caused the accident, but all the questions involved may be reduced to two, namely: (1) Whether Conductor Huston or the brakeman who operated the switch occupied the position of vice-principal to the plaintiff's intestate Miller, so that his negligence in failing to discover that the switch was disarranged was the negligence of the company, and rendered it liable for the injury he sustained; and (2) whether the trial court erred in refusing to allow the judgment roll of the circuit court of the state of Oregon for Linn county, showing the indictment and conviction of one W. A. Hill for the killing of the said John W. Miller by disarranging a switch on the road of the defendant, and thereby causing the locomotive to be derailed in Linn county on July 28, 1889, to be received in evidence, or to allow Dr. Davis, a witness for the defendant, to answer certain questions as to whether he (W. A. Hill) ever confessed or admitted to him that he interfered with or broke the switch on the occasion under consideration. These will be considered in the order stated. There was a general rule of the company providing that conductors would be held personally responsible for the proper adjustment of switches used by their trains, and it was claimed that the effect of this rule was to create Huston vice-principal of Miller as between the latter and the company. The argument for the plaintiff proceeds upon the assumption that the switch was broken and disarranged when the Lebanon locomotive used it, and that Huston had devolved upon him the duty of seeing that the switch was properly adjusted, which being a personal duty the company owed to Miller, that the negligence of Huston in failing to discover that the switch was out of order was the negligence of the company, and rendered it liable for the injurious consequences which ensued. The rule was a proper and needful regulation, and obedience to it was well calculated to insure safety, but it was not designed to create any new or distinct liability other than the law established. As a rule, it did not operate to change the rule of law which governed

the relation of the parties and fixed their liabilities. The conductors were not expected to perform the duties of switchmen — some one under them, usually a brakeman, discharged this duty, by their direction ; and the object of the rule in making them responsible was to secure the best possible performance of the duty of a switchman to insure safety in operating the trains. It added no new or other element to the legal relation of the parties concerned than already existed. The whole duty combined and to be performed in this regard by conductor and switchman, in operating the switch, only constituted the proper discharge of the duty of a switchman. It is not the duty of the master “as with a personal sight and touch” to operate the switches on the road. “It is utterly impracticable so to do, and a brakeman or fireman on a train knows that he is, as well as any person, connected with the business.” And Folger, J., said : “The duty of the master is performed when he provides beforehand, and makes known to his servants, rules explicit and efficient, which, if observed and followed by all concerned, will bring personal notice to every one entitled to it” (Slater v. Jewett, 85 N. Y. 61); and in the present case, “if followed and observed,” will bring safety and security, as was intended by the rule. But the act performed was that of a switchman, the duty being to operate the switch and adjust the rails, and the object of the rule was to secure its proper performance, or to avoid its negligent discharge to insure safety. It was its negligent discharge which caused the injury. It is, then, the character of the act to which we must look to determine the legal relations of the parties concerned. The act involved the duty of a switchman, which was to operate and properly adjust the switch, a duty which could not properly be performed without discovering any failure of the switch to properly adjust the rails. In the case at bar the duty was to operate the switch and pass the locomotive on the branch track and then adjust it so that the south-bound train coming on the main track would have a continuous line at that point. A like duty would have devolved upon any switchman who might have been detailed and stationed at that switch, and which counsel claim ought to have been done to guard against the switch being tampered with and disarranged. The duty of a switchman is to operate the switch, and see that it properly adjusts the rails, so that the trains

may pass with safety ; and it is the negligent discharge of this duty with which we are to deal. We begin by saying that the principle that any duty which the master is required to perform for the safety and protection of his servants cannot be delegated to any servant of any grade so as to exempt the master from liability to a servant who has been injured by its non-performance, cannot be questioned, nor that among these duties are not included the duty of a railroad company to keep its road-bed and track, rolling stock, tools, machinery and appliances in good and safe condition, to cause a frequent and thorough inspection of these as can be done consistently with the conduct of its business for the purpose of discovering any defects that may occur from accidental causes, or the effects of wear and tear, or the progress of decay, to exercise care in the selection of its servants, and in their retention in its service, and to adopt such rules and regulations as are calculated to guard against accidents, and to make the servants in its employ reasonably safe. Our inquiry then is: Was the character of the act performed by the servant such an act as the law implies a contract duty upon the part of the master to perform? For if it was, then such servant, in respect to that act, ceases to be a servant, and becomes an agent or vice-principal. Now, the case presented is not negligence of a switchman in leaving a switch, safe and suitable as an appliance, open and misplaced, whereby a like accident would have happened, but negligence in failing to discover that a switch had been put out of order by some extraneous circumstances, so that it did not operate to adjust the line as it ought, and was supposed to have done.

In one case the negligence consists in leaving a switch, sound and suitable for its purposes, open and misplaced; and in the other, in leaving the switch open and misplaced, because the switch, having been put out of order, did not operate, and that fact was not observed. But in either case the switchman would seem equally derelict or negligent, for the duties of his employment require him to see that the switch moves the rails, and puts them where it is designed that they should go for the operation of the trains ; and this duty, when properly performed, necessarily includes the observance of any failure of the switch to operate or perform its office in adjusting the rail. Taking the view of the

facts as claimed by the plaintiff, his position is that the switch was tampered with, or put out of order, before the Lebanon locomotive passed over it. Nor is it claimed that the switch was not originally a safe instrumentality, and suitable for its purpose, or that a sufficient length of time elapsed since the switch was disordered to charge the defendant with notice of its condition; but the claim is that the employe, upon whom was devolved the duties of a switchman, stood for the master in the performance of that duty, and that, when the Lebanon engine passed, the switch being out of order, if such employe had exercised ordinary care in the performance of this duty, he would have seen that the switch did not operate and adjust the rails, and examined the cause of it, and discovered its disordered condition, and prevented the accident. Counsel admit that such employe or servant may be a fellow-servant of Miller in the performance of some of his duties, but they say: "In the duty of maintaining a switch in order as a safe instrumentality for the performance by Miller of his duty within the line of his hazardous employment he was not a fellow-servant," citing *Ford v. Railroad Co.*, 110 Mass. 260, in which the court say: "The agents who are charged with the duty of supplying safe machinery are not, in the true sense of the rule relied upon, to be regarded as fellow servants of those who are engaged in operating it." But can it be said that a switchman or employe upon whom is devolved the duty of a switchman is charged with the duty of maintaining a switch in order as a safe instrumentality; that is, if the switch is out of order, to repair it or to supply a new one when necessary? It is no doubt true that such a duty devolves upon the defendant as master, or any servant to whom it delegates the duty, to exercise care, not only in the construction, but the maintenance in repair, of its switches as well as its tracks, road-beds, bridges, and trestles, etc. The reason is that these are personal duties, which the company is legally bound to perform, and owes to its employes operating its trains over the road; but when the company delegates such duties to its servants it is liable for the negligent performance of such duties. Hence, as Mr. McKinney says: "A section boss in charge of a squad of hands working, altering and repairing the road, or one of his subordinates, can in no sense be regarded as a fellow-servant of employes operating trains over the road, so as

to exempt the company from liability for their negligence in leaving the track defective. The company delegates to these employes the performance of a duty which the law makes it incumbent on the company to perform, *i. e.*, that of furnishing a reasonably safe track and road-bed, and keeping it in repair, and it is liable for the negligent performance of this duty." McKinney Fel.-Serv., § 136, and note of authorities.

If we take the character of the act performed by such servant to determine whether he is an agent or representative of the company or a fellow-servant, what is there in the act of operating a switch so as to properly adjust the rails for the passage of trains, which may be considered in any sense to impose or delegate the duty to such employe to furnish, construct, keep, or maintain in repair such switch? However liberally we may construe the rule as to co-servants, it is difficult to perceive, if the rule itself is to remain, that a servant engaged in the operation of a switch is a representative of the master, or other than a fellow-servant engaged in a common employment for the successful management of the trains. The act he performs involves no duty of construction or repair, or other duty in regard to the switches of the road if out of repair and unfit for use, whether by wear and tear or by the criminal interference of strangers, than to promptly notify the company of its condition, so that it may be repaired or its place supplied. It is the law, in the absence of express contract, that establishes the relation of the parties creating him agent or representative of the master who performs duties which the law itself makes it incumbent on the master to perform, and not the rules or regulations of the company, which are designed for the guidance of its servants, and to secure reasonable safety in the conduct of its business. The failure to make proper rules and regulations adapted to the proper management of a hazardous business might render a railroad company liable, but the object of the rules is not to alter or affect the legal relation of the servant. In this regard the defendant was not negligent; it had promulgated a rule designed to secure safety in the passing of trains, and to remind its servants of their responsibility, and to enforce the observance of care in the proper adjustment of its switches when used. "It may be conceded," said Johnson, J., "that it is the duty of a railroad corporation to prescribe, either

by means of time-tables or by other suitable modes, regulations for running their trains with a view to their safety; but it is obvious that obedience to these regulations must be intrusted to the employes having charge of the trains. Such obedience is matter of executive detail, which, in the nature of things, no corporation or general agent of a corporation can personally oversee, and as to which employes must be relied on." *Rose v. Railroad Co.*, 58 N. Y. 221. It is not the rule, but the legal relation which the parties sustained to each other, whether co-servants or not, which determined the liability of the company. The case stands in this wise: As the switch was originally safe and suitable as an instrumentality, and the evidence indicating that it was tampered with and put out of order before the Lebanon train passed, and none tending to show that by the exercise of reasonable care and diligence the company knew or ought to have known that it was so disarranged, and not in proper working order, so as to affect it with notice of its condition, unless the employe upon whom was devolved the duty of a switchman represented the company, and is chargeable with notice of its disordered condition, the plaintiff has no standing ground. The necessities of the case require that such employe shall be considered as a representative of the company in the negligent performance of this duty to affect it with liability. It is therefore claimed that it was the duty of such employe to maintain the switch in good order as a safe appliance for the passage of trains, which, being the duty of the company, the company must be considered as constructively present in the person of the switchman when he operated it and left it misplaced, and is chargeable by reason thereof with notice of its condition, and his negligence in not discovering it was the negligence of the company. But we have already shown that no duty of constructing, repairing, or maintaining in good order such appliances is delegated to such employe, or that he is invested with any power or authority in the premises other than performing the duty of a switchman; and, there being no evidence to charge the company with notice of its disarranged condition, except through such employe, the company is entitled to be considered as having performed its duty, unless he was its agent or representative, so as to affect the company with notice, and render it liable for his negligent discharge of the duty of switchman. That a switchman is

a fellow-servant to the employes on the train has been so frequently held as seems to admit of little doubt. McKinney on Fellow-Servants (section 138) says: "The co-operation of the switchman is necessary to the successful management of the trains, and employes upon the train in the common service assume the risk of the negligent discharge of his duty." In *Roberts v. Railroad Co.*, 33 Minn. 218; 22 N. W. Rep'r, 389, the train ran off the track in consequence of a misplaced switch, negligently left open by a switchman, thereby causing the death of a baggage-master on the train. The court held that the switchman and baggage-master were fellow-servants within the rule exempting the company from liability. In *Brown v. Railroad Co.*, 68 Cal. 174; 8 Pac. Rep'r, 828, the court say: "The engineer and switch-tender, although on duty in separate departments, were, in the discharge of their duties, under the same general employment; and for the negligence of the fellow-servant of the intestate the defendant is not liable." In *Harvey v. Railroad Co.*, 83 N. Y. 484, an engine attached to a train on defendant's road was thrown from the track by a misplaced switch, which the switchman had neglected to close, he being engaged at the time in conversation with another.

The plaintiff's intestate, who was the fireman on the engine, was killed. The court say: "This is a plain case. It is evident that the cause of the injury was the neglect of the switchman to properly adjust the switch after using it to pass the local freight. As the switchman must be deemed to have been the co-servant of the plaintiff's intestate, the plaintiff cannot recover, unless some neglect of the defendant as principal also contributed to produce the injury." In *Naylor v. Railroad Co.*, 33 Fed. Rep'r, 801, in an action against a railroad company for the death of the plaintiff's intestate, who was an engineer, it appeared that the death was caused by the negligence of a switchman, who left a switch open. Held, that the engineer and the switchman were fellow-servants. In *Randall v. Railroad Co.*, 109 U. S. 483; 3 Sup. Ct. Rep'r, 322, it was held that a brakeman working a switch for his train on one track in a railroad yard is a fellow-servant with the engineer of another train of the same corporation. Mr. Justice Gray, who delivered the opinion of the court, said: "The general rule is now firmly established, that one who enters the service of another, takes upon himself the ordinary risks of the

negligent acts of his fellow-servants in the course of the employment. * * * Persons standing in such relation to one another as did this plaintiff and the engine-man of the other train, are fellow-servants according to the very great preponderance of judicial authority in this country, as well as the uniform course of decision in the house of lords and in the English and Irish courts, as is clearly shown by the cases cited in the margin," citing numerous authorities. In *Slattery's Adm'r v. Railroad Co.*, 23 Ind. 83, it was held that a brakeman on a train and one whose duty it is to attend a switch are engaged in the same general undertaking, and the company is not liable to one for an injury caused by the negligence of the other. In *Railroad Co. v. Henry*, 7 Ill. App. 322, it is held that an engineer running a switch-engine and a switch-tender are engaged in common employment, and are fellow-servants. In *Walker v. Railroad Co.*, 128 Mass. 10, an engineer and fireman were killed by a misplaced switch, which had been negligently left open; and upon an action to recover damages the court below directed a verdict for the defendant, which was sustained, the court saying: "The cause of action in each of these cases was the misplacement of a switch through the negligence of a fellow-servant of the plaintiff's intestate," citing *Farwell v. Railroad Corp.*, 4 Metc. (Mass.) 49; *Gilman v. Railroad Co.*, 10 Allen, 233. See, also, *Railroad Co. v. Troesch*, 68 Ill. 549; *Tinney v. Railroad Co.*, 62 Barb. 218; 7 Am. & Eng. Enc. Law, 886, "Fellow-Servants;" *McKinney Fel.-Serv.*, § 138. Nor is there any thing decided in the cases to which our attention has been specially called in conflict with the principle we are deciding. In the case of *Davis v. Railroad Co.*, 55 Vt. 84, it appeared that through the negligence of the company's bridge builder in constructing and the road-master in repairing a culvert it washed out, whereby a foreman was killed, and the court held that the company was liable, saying: "The bridge builder and road-master, while inspecting and caring for the defectively constructed culvert, were performing a duty which, as between the intestate and the defendant, it was the duty of the defendant to perform. Their negligence therein was the negligence of the defendant." This is but applying the rule that where the master has intrusted a duty to a servant which the law devolved upon him to perform, such servant is his representative, and any negligence on his part is the

negligence of the master. *Calvo v. Railroad Co.*, 23 S. C. 531, was decided on the same principle. There a locomotive engineer, while running his engine, was injured through the negligence of a section-master and supervisor of the track-laying force, who, in disregard of the appropriate signals, took up a portion of the track, and thereby derailed the engine. The court held that the true test was whether this section-master was employed to discharge the duties of the master, and also that it was the duty of the master to provide a suitable and safe place for his employes to work in and on, which duty in this case has been committed to the section-master. His negligence was, therefore, properly adjudged the negligence of the master. The same principle was recognized in the case of *Moon v. Railroad Co.*, 78 Va. 745. In that case the decedent was a brakeman on a material train. A section gang at work on the track failed to signal the train, although it had the rails misplaced. In consequence the train was derailed, and the decedent so badly injured that he died in a few hours. The court held that the section-men and the decedent were not fellow-servants, saying that "when a company delegates to an agent or employe the performance of duties which the law makes it incumbent on the company to perform, his acts are the acts of the company, his negligence is the negligence of the company." Here the section-master was in charge of a squad of men working, altering and repairing the road — duties personal to the master, and which he was legally bound to perform, and consequently for which the master was responsible, if negligently performed by the servants to whom he intrusted them. The cases cited by the court — *Brothers v. Carter*, 52 Mo. 372; *Flike v. Railroad Co.*, 53 N. Y., 549; *Corcoran v. Holbrook*, 59 N. Y. 517; *Mullan v. Steamship Co.*, 78 Penn. St. 25; *Ryan v. Railroad Co.*, 60 Ill. 171 — recognize the same principle, and it is not questioned. Among other cases affirming this doctrine are *O'Donnell v. Railroad Co.*, 59 Penn. St. 239; *Railroad Co. v. Carroll*, 6 Heisk. 348; *Railroad Co. v. Holt*, 29 Kans. 149; *Slater v. Jewett*, 85 N. Y. 61. In all these cases the master intrusted a duty to the servant which the law made it incumbent on him to perform, and within the meaning of the rule as to liability for negligence he was a representative of such master in the performance of that duty, and not a fellow-servant.

The duties of a switchman to operate the switch and to adjust it properly for the passage of trains involve no delegation of authority to furnish or keep or maintain in repair the track or its switches or any of its appliances. No duty of this kind was confided to such employe, or included in the character of the act he performed, and without which he cannot be made a representative of the company, so as to effect it with liability for negligence. It is unquestionably the duty of the master to every employe to provide suitable appliances, machinery and instrumentalities, and a reasonably safe place to perform his labor, and his failure to do so, whether by personal negligence or negligence of a servant to whom he has delegated such duty, will render him liable; but the master cannot be held liable for the negligent performance of a duty by a servant which involves the performance of no such personal obligation. If the company is to be held liable for negligence, some other ground must be sought upon which to predicate it; for the books seem decisive to the point that such a servant, engaged in the performance of the duties of a switchman, is not a representative of the master, but a fellow-servant of the employes upon the train — of the plaintiff's intestate — who assume the risk of his negligent discharge of his duties. While some of the authorities extend the rule further than others, and embrace a more numerous and various class as fellow-servants engaged in a common employment — and further than we are inclined to extend it — yet none of them have so limited and restricted its operation as to destroy the relation of fellow-servants between a switchman and the servants on the train, and consequently the master cannot be held liable for the negligent discharge of his duties.

The next objection relates to the refusal of the court to admit as evidence the indictment and judgment of the conviction of W. A. Hill for the killing of the plaintiff's intestate by disarranging a switch on the defendant's railroad, and certain confessions it was proposed to prove that he had made to Dr. Davis. The court considered the evidence as *res inter alios acta*, and declined to admit it. It was shown by the evidence that Hill and his companions applied to Conductor Huston about one-half hour before he left Albany with his locomotive on that evening for the privilege of riding upon his locomotive to the farm at which they

were working on the line of the Lebanon branch of the company's road, and that Huston refused to allow them to ride, as it was contrary to the rules of the company, and that they left and walked away in the direction of the switch. The evidence is offered on the ground, as stated, by counsel, that "it is a matter of public notoriety that the switch mentioned in the pleadings was, on the evening of the day on which this accident occurred, tampered with and disarranged by one W. A. Hill and his accomplices, and that as a result the train was derailed, and the intestate and his fireman, Guthrie, were mortally injured; that Hill was convicted of the crime upon his own confessions, and sentenced to the penitentiary therefor; that his accomplices escaped because there was no witness to their acts except themselves, and their confessions were ruled to have been made under such circumstances as to exclude them from being given in evidence against them; that, as there was no witness of their general subsequent conduct with the breaking of the switch, there was no proof of it other than the record of Hill's conviction," etc., of which a certified transcript was offered in evidence, and ruled out, and the defendant left without any evidence in support of its plea.

Counsel say they "have searched the books in vain for a case in point," but they have been unable to find any bearing on the subject. Their argument in support of its admission is that the record of the conviction of a party of a crime by the public prosecutor is public property, and may be given in evidence whenever it becomes a fact material to be shown in connection with the issues joined in any other suit or action; that it is not conclusive evidence against whom it is offered, nor does it estop him to controvert or deny it, but that it is *prima facie* evidence of the facts thereby established. They cite *Maybee v. Avery*, 18 Johns. 352, and *Mead v. Boston*, 3 Cush. 404. The effect of the ruling in *Maybee v. Avery*, *supra*, can be best understood from Judge Sutherland's statement of it in *People v. Buckland*, 13 Wend. 596, and from which we cite. He says that Judge Spencer, "after stating the general rule that in order to render a verdict and judgment competent evidence it must be on the same point, and between the same parties or privies, and give the reason on which the rule is founded, he adverts to the exception to the rule which has already been noticed, to-wit, that where the matter in

dispute is a question of public right all persons standing in the same situation as the parties are affected by it; and he remarked that in his opinion a verdict on an indictment formed another exception, and upon the same principle; that the public was the party aggrieved, the prosecution was carried on by their officer, and that any person might when necessary avail himself of a conviction. He observed that the plaintiff in the case could not complain, for he had an opportunity to cross-examine the witness, and to produce his testimony, and to reverse the judgment if erroneous; but that the verdict was not conclusive, and that the plaintiff should have been allowed to repel it." The evidence which was objected to in that case was a record of conviction for stealing two hens, but was admitted by Judge Spencer, who tried the case. The plaintiff then offered to show that the evidence of which he was convicted was false, and that he in fact owned the two hens. This was objected to on the ground that the record of conviction was conclusive until reversed, which was sustained, and the evidence rejected. Upon a motion for a new trial it was held that the record of conviction was admissible in evidence, but that it was only *prima facie*, and that the plaintiff should have been allowed to disprove the fact, and to give evidence of the falsity of the testimony on which the conviction was founded. This case, as Sutherland, J., observed, "only decides that a verdict and judgment on an indictment are competent *prima facie* evidence against the defendant in the indictment," but he adds that "the principle laid down * * * makes them competent evidence upon the point involved even between strangers to the original proceedings, and this I am inclined to think is the true rule." In *Mead v. Boston*, 3 Cush. 406, Shaw, C. J., said: "The admission in a civil action of a conviction on an indictment founded on a plea of guilty is not an exception to this rule. That is received not as a judicial act, having the force and effect of a judgment, but as a solemn confession of the very matter charged in the civil action. 1 Greenl. Ev., § 537." But the record of conviction offered in this case was not founded on a plea of guilty, but Hill pleaded not guilty, and his confessions were proven upon which he was convicted." In *Brownsword v. Edwards*, 2 Ves. Sr. 245, it was held that a sentence in a criminal proceeding cannot be used as evidence in a civil action. The lord chancellor said: "On the

trial the sentence was offered in evidence to prove that they were not married. The whole court were of the opinion that it could not be given in evidence, because, first, it was a criminal matter, and could not be given in evidence in a civil cause; next, that it was *res inter alios acta*, and could not affect the issue." In *Gibson v. McCarty*, Hardw. Cas. Temp. 311, a judgment of conviction for forgery was offered in evidence, but it was held that such record of a conviction in a criminal matter cannot be read as evidence in a civil suit. In *Rex v. Warden of the Fleet*, 12 Mod. 339, it was held that a conviction of battery would not be evidence in an action for the same battery, nor *vice versa*, and that records of conviction or verdicts could not be given in evidence whenever the benefit would not be mutual. See, also, *Patterson v. Gaines*, 6 How. 586; 1 Greenl. Ev., § 537; *Com. v. Lincoln*, 110 Mass. 410. The real ground is a want of mutuality arising from the parties not being identical; nor are the rules of decision and the course of the proceedings the same. While it is true there does seem to be some privity between the facts offered to be established by the records of conviction and the fact in issue which would make it relevant evidence, and receivable as such, yet it has been thought better for the administration of justice to preserve the general rule which excludes verdicts and judgments between other parties than to form an exception to it because of some particular circumstances. In excluding this record we are not prepared to say that the court erred; but for the reasons already stated the judgment must be reversed, and a new trial ordered.*

1. **Railroad companies—master and servant — who are fellow-servants.** — As to the question, who are fellow-servants as among railroad employes, see *Louisville, etc., R. Co. v. Petty*, 2 Am. R. R. & Corp. Rep. 169, and note. Though the safety of the laborers on a work train requires that the engineer should give the customary signals when the train is about to start, and it is made a part of his duty to give the signals, his failure to do so is the negligence of a fellow-servant, and the railroad company is not liable for a resulting injury to a laborer on the train. *Higgins v. Mo. Pac. Ry. Co.*, 104 Mo. 413; 16 S. W. Rep'r, 409. A railroad company is liable to a laborer, working at a derrick of the company, assisting in hoisting stone and giving signals, for injuries caused by the negligence of the foreman, whose duty it was to direct repairs and keep the derrick in safe condition, if such laborer is without fault. *Union Pac. Ry. Co. v. Fray*, 48 Kans. 750; 28 Pac. Rep'r, 1039. A foreman employed by a railroad company, having exclusive charge and control of the

* Reported in 28 Pac. Rep'r, 70; 20 Ore. 285.

laborers working under him, with full authority to direct where they shall work, is not a fellow-servant of the laborers, and the railroad company is liable for his negligence in ordering them to work in a dangerous place. Louisville, etc., Ry. Co. v. Graham, 124 Ind. 89; 24 N. E. Rep'r, 608. The brakeman and engineer upon the same train are fellow-servants. Hobbs v. Atlantic, etc., Ry. Co., 107 N. C. 1; 13 S. E. Rep'r, 124; Railway Co. v. Smith, 88 Tenn. 611; 14 S. W. Rep'r, 427. A car inspector and repairer employed in a railroad yard held a fellow-servant with a conductor of a train in the same yard, through whose negligence he was injured. Whitney v. Boston & Me. R. Co., 150 Mass. 477; 23 N. E. Rep'r, 220. The fireman on one engine and the engineer of another in the same yard held fellow-servants. Peaslee v. Fitchburg R. Co., 152 Mass. 155; 25 N. E. Rep'r, 71. A car inspector and brakeman held not to be fellow-servants where the negligence consisted in the failure of the car inspector to detect a defective brake. Morton v. Detroit, etc., R. Co., 81 Mich. 428; 46 N. W. Rep'r, 111. A switchman and yard-master are not fellow-servants. Lyttle v. Chicago, etc., R. Co., 84 Mich. 289; 47 N. W. Rep'r, 571.

2. When company liable though accident due to negligence of a fellow-servant.—Plaintiff was injured by the derailment of the train of which he was engineer, from running into a partly-open switch. About a year before, the switch had been abandoned, the lights taken down, and the rails spiked. The rules required engineers not to run over fifteen miles an hour, in passing a switch which was in daily use. Plaintiff was running forty-five or fifty miles an hour. Plaintiff's evidence was to the effect that he did not know of the reopening of the switch, and that if there had been lights on it, he could have seen them in time to prevent the accident. Held, that if this was the case, the negligence of the company in not having lights was a concurrent cause of the accident, and plaintiff could recover, though the switch was left open by a trespasser or fellow-servant. Town v. Mich. Central R. Co., 84 Mich. 214; 47 N. W. Rep'r, 665. The company having abandoned the switch and removed the lights in the first place, and the division superintendent, as the agent of the company, having directed and authorized the removal of the spikes and the second use of the switch, failure to notify plaintiff or restore the lights was the negligence of the company, and not of the section-master, plaintiff's fellow-servant. Ibid.

Where a servant is injured by an accident caused by the failure of a fellow-servant to perform a particular duty because of his absence from his post, evidence that such fellow-servant was in the habit of leaving his post when his presence there was necessary to prevent accidents, and that the master might, by the exercise of reasonable diligence, have known of such habit, is sufficient to establish the master's negligence. Coppins v. New York Cent., etc., R. Co., 122 N. Y. 557; 25 N. E. Rep'r, 915.

3. A railroad company having cut its road-bed along the side of a mountain, it is negligence for it to leave masses of rock, which had been loosened in blasting, in such a position that they are liable to fall at any time upon the track; and it is not relieved from liability for a consequent injury to an employe on its train by the fact that it hires a track-walker, whose duty it is before and after the passage of each train, to see whether rock has fallen, or is about to fall, even though it be assumed that the track-walker is a fellow-

servant with the employee, for without the prior negligence of the company, the negligence of the track-walker could not have resulted in the injury. *Bean v. Western N. C. R. Co.*, 107 N. C. 781; 12 S. E. Rep'r, 600. The danger in such case is not one with knowledge of which the trainmen are chargeable, where it is shown that they, when on the train, are on the level with the rock, which does not look dangerous from that point; and they will not be held to have assumed the risk, unless knowledge is proved. *Ibid.*

The action of an engineer on a switch-engine in permitting the engine to be operated under his direction by his fireman, who had nearly two years' experience at the work, and who had been accustomed to handle the engine, is not such negligence as will enable a fellow-servant to recover from the railroad company for an injury sustained in coupling a car to the engine while being sooperated by the fireman. *Thompson v. Lake Shore, etc., Ry. Co.*, 84 Mich. 281; 47 N. W. Rep'r, 584.

The fact that an injury to a servant was caused by the negligence of a fellow-servant does not excuse the master from liability therefor where it appears that the accident would not have happened had not the master himself been negligent. *Coppins v. New York Central, etc., R. Co.*, 123 N. Y. 557; 25 N. E. Rep'r, 915.

GIFFORD V. RUTLAND SAVINGS BANK.

(Supreme Court of Vermont, Jan. 10, 1891.)

1. SAVINGS BANKS. DEPOSITORS' ASSENT TO BY-LAWS. Though the by-laws of a savings bank require that depositors shall subscribe their names in a book, and thereby be considered as assenting to all the by-laws, such assent may be implied, and will be where a depositor living at a distance, and receiving a deposit book by mail, with the by-laws printed in it, leaves the deposit, and keeps the book for several years, without going to the bank and leaving his signature.

2. PAYMENT TO WRONG PERSON. LIABILITY. The brother of a depositor in defendant bank, neither of whom was known to the bank officers, presented the deposit book, which he had stolen, for payment, representing himself as the owner, and, when asked how the deposit had been made, he correctly replied that it was by letter from a third person. In signing the name he formed an initial so obscurely that it caused comment from the president. Notice of the loss of the book, required by the by-laws to be given defendant, as a guard against a wrong payment, and as a prerequisite for defendant's liability therefor, was not given. Held, that defendant used reasonable care in making payment, and was not liable.

GENERAL *assumpsit* for the amount of a deposit. Plea, the general issue, with notice of special matter. Heard upon an agreed statement of facts at the September term, 1889, Rutland county, Powers, J., presiding. Judgment *pro forma* for

the defendant. The plaintiff excepts. The defendant was a savings bank, located at Rutland, having between five and six thousand different depositors. December 27, 1884, one Rogers sent a check to the defendant for \$150, with a letter directing that the amount be credited to Charles L. Gifford, the plaintiff. This was done upon the books of the company, and a deposit book issued and sent by mail to the plaintiff. December 8, 1885, said Rogers sent another check for \$250, with the plaintiff's book, to the defendant, directing that \$125 be credited to the plaintiff. This was entered upon the plaintiff's book, which was thereupon returned to him. This was the deposit in question. The plaintiff kept the book in his possession until September 26, 1888, when it was stolen by his brother, who upon the next day presented and received payment upon it upon the following circumstances: "On the 26th day of September, 1888, said George R. Gifford called at the banking-house of the defendant, and presented said book of the plaintiff to William M. Field, the president of the defendant, and asked for the money upon it. Mr. Field asked him if his name was Charles L. Gifford, and he said it was. He asked him, then, if he was the owner of said book, and he replied that he was. Field asked the young man how the money was deposited, and he replied that it was sent in a letter. He then asked him why he wanted to draw the money, and got reply that he was going away, and wanted to use it. Mr. Field gave him something of a lecture on the subject of drawing his money, and advised him to be prudent and saving. Mr. Field then made up the account of interest, amounting to \$40.44, and presented the book for receipt of money for signature, and the young man wrote the name of plaintiff. The signature attracted attention of Mr. Field, and he looked at it, and said: 'That is a pretty looking thing for an L,' or, 'that is a pretty looking L.' Thereupon the boy took the book back, and changed the letter somewhat, so as to more nearly resemble an L. Thereupon Mr. Field paid him the money, amounting to \$315.44, and the man took the money and left. The young man who drew the money was about twenty years old, somewhat tall, and stooped slightly, and did not resemble the plaintiff, who is ten years or more older. The president of the bank had never seen the plaintiff, and had never seen his signature or handwriting, and plaintiff had never been in the

bank prior to payment to said George R., as aforesaid, and the young man who drew the money was a perfect stranger to him, and was not identified by any person, and was not asked to procure any identification, or any questions, except as aforesaid, and produced no letters or papers whatever except the deposit book, which had been stolen by him from said trunk." The deposit book was in the usual form. On the outside of the front cover were printed, in noticeable letters, these words: "Read this book and take care of it. If you lose or mislay it, give immediate notice to the bank, for if it gets into improper hands you may be defrauded." In the back part of the book were printed the by-laws. Articles 11, 17, and 22 were as follows: "Art. 11. All deposits shall be entered in the treasurer's books, and duplicates given to each depositor, and each depositor, on his first deposit, shall subscribe his or her name to the book kept for that purpose, and shall by that act be considered as assenting to and being bound by all the by-laws and regulations of the corporation." "Art. 17. When any person shall receive either principal or interest, the original deposit book or voucher shall be produced, that the payment may be entered therein; but, in case of sickness or absence, the money may be paid to the written order of the depositor, accompanied by the book." "Art. 22. As the officers of the institution may be unable to identify every depositor transacting business at the office, the institution will not be responsible for loss sustained when a depositor has not given notice of his book being lost or stolen, if such book be paid in whole or part, on presentment."

Joel C. Baker for plaintiff. *Edward Dana* for defendant.

Rowell, J. That the bank took plaintiff's deposits without requiring his assent to the by-laws by subscribing his name to the book kept for that purpose, as provided by the eleventh article, is not conclusive that he did not otherwise assent to them; for we do not regard that method of assent as intended to be the only method, but only one method. The maxim that the express mention of one thing implies the exclusion of another is often exceedingly helpful in the construction of contracts, but great caution is necessary in dealing with it; for, as said by Lord Campbell in *Saunders v. Evans*, 8 H. L. Cas. 729, it is not of universal application, but

depends upon the intention of the parties as discoverable from the face of the instrument or transaction. Broom Leg. Max. 653. Williams, J., in *Archipelago Co. v. Reg.*, 2 El. & Bl., 879, says it is by no means of universal nor conclusive application; and he gives instances of its non-applicability. Now we discover nothing upon the face of this transaction which shows that it was the intention of these parties that plaintiff should be deemed to assent to the by-laws only by subscribing his name to said book; but quite the contrary appears. Both parties knew that plaintiff had not signed said book, but yet they continued to occupy to each other the relation that the deposits created, and presumably with the mutual intention that all the rights and incidents of that relation should attach to it, as it is not to be presumed that they or either of them expected or intended that the non-compliance with one by-law should nullify the whole, but rather that the matter should stand as though that by-law did not exist. Hence, by receiving and holding the deposit book as his voucher against the bank, with the by-laws printed in it, of which the case shows he had actual knowledge, and continuing his relation of depositor, he must be taken thereby to have assented to the by-laws, save the one that he knew was not complied with, and to have agreed to them as a part of the contract of deposit. And so it has been elsewhere held. *Heath v. Bank*, 46 N. H. 78; per Ellsworth, J., in *Eaves v. Bank*, 27 Conn. 229; *Goldrick v. Bank*, 123 Mass. 320. The by-law based upon the difficulty of identifying depositors doing business at the bank, which provides that the institution will not be responsible for loss sustained when a depositor has not given notice of his book's being lost or stolen, if it is paid in whole or in part on presentation, has often been held to be a reasonable and proper regulation for the protection of the bank. See the cases *passim*. But this by-law does not relieve the bank from the exercise of reasonable care, and payment to the wrong person, on presentation of the book, even before notice of its loss, will not exonerate the bank, if the attendant circumstances were sufficient to excite the suspicion of a prudent man, and put him on inquiry. *Sullivan v. Institution*, 56 Me. 507; *Kimball v. Norton*, 59 N. H. 1; *Levy v. Bank*, 117 Mass. 448; *Appleby v. Bank*, 62 N. Y. 12; *Allen v. Bank*, 69 N. Y. 314. It is a rule of frequent application that one who has knowledge of facts sufficient to in-

duce a prudent man to inquire in respect of other facts germane to the matter in hand will be charged with knowledge of such other and further facts as he might have learned by diligent inquiry in the right direction. But it is competent to rebut the presumption of such ascribed knowledge, by showing the existence of other and attendant circumstances of a nature to allay his suspicion, and to lead him to believe that inquiry was not necessary. A majority of the court think that the circumstances of this case are not such as to charge the bank with knowledge of any facts not learned at the time the money was paid. The bank had not been notified of the loss of the book. The plaintiff had never been at the bank, and was not known to any of its officers. The thief was also unknown to them; but he came to the bank with the book in his possession, and that possession was apparently lawful. On inquiry, he answered truly that the money was sent by letter for deposit, a statement well calculated to ward off suspicion, for the manner of sending, from its nature, was a fact peculiarly within the knowledge of those having to do with and interested in the deposit, and one that others would not be likely to know about. Nor was there any thing suspicious in the way the thief made the "L." Perhaps the plaintiff himself would have done no better. It is not suspicious that a man writes a name awkwardly. Many men write their own names that way, not to say illegibly. Nor was the bank bound to require the thief to identify himself as the depositor further than he did by producing the book. There being no suspicious circumstances, the very terms of the by-law relieved it of that duty, and to require it would be to nullify the by-law, which is a part of the contract, and provides for just such a case as this. Judgment affirmed.*

1. *Savings banks—pass books—bona fide holder of.*—A stranger, H., presented for deposit at defendant savings bank in Connecticut a check on another bank, and received two pass books, a portion of the amount being entered in each. The check proved to be fraudulent, and the bank published notice thereof. Afterward H. presented one of the books to plaintiff in Dublin, requesting a loan thereon. Plaintiff declined, but afterward gave to a bank there his draft, accepted by H., and indorsed by himself. The bank discounted the draft for H., and took the book, with his order for collection. On learning that the book was obtained by fraud, the bank returned it to plaintiff, who paid the draft. Held, that plaintiff was guilty of negligence,

* Reported in 21 Atl. Rep'r, 340.

and was not a *bona fide* holder of the book. *McCaskill v. Conn. Sav. Bank*, — Conn. —; 22 Atl. Rep'r, 568.

2. *Pass book not negotiable.*—Such pass book, issued by a savings bank was not a negotiable instrument, nor was it rendered such by an order, signed by the pretended depositor, directing payment to a third person. *Ibid.* To the same effect *Commonwealth v. Bank*, 183 Mass. 16; *Smith v. Bank*, 101 N. Y. 58; *Witte v. Vincenot*, 43 Cal. 325.

3. *Entries in, when not an estoppel upon the bank.*—The entry in the pass book, procured through fraud, and made by the bank without knowledge of the truth, or intention that the representation should be acted on, did not create an estoppel. *Ibid.*

4. *Pass book not conclusive as to ownership of deposit.*—Though deposits in a savings bank are made in the name of the wife it is competent to show by parol evidence that the real ownership was in the husband. *Kennebec Savings Bank v. Fogg*, 88 Me. 374; S. C., 22 Atl. Rep'r, 231. So when a bank deposit book designates the depositor as trustee for another, the book is not conclusive evidence of the trust. *Parkman v. Suffolk Savings Bank*, 151 Mass. 218; S. C., 24 N. E. Rep'r, 43. See, also, *Robinson v. Ring*, 72 Me. 140; *Marcy v. Amazeen*, 61 N. H. 181. In an action for money so deposited by plaintiff's intestate, evidence that intestate had deposited in his own name the full amount allowed by the rules of the bank is admissible, as offering a possible explanation for the form in which the deposit in controversy was made, other than an intent to make a gift. *Parkman v. Suffolk Savings Bank*, 151 Mass. 218; S. C., 24 N. E. Rep'r, 43.

In an action for moneys deposited with defendant bank, it appeared that the deposits stood in the name of plaintiff, and that a deposit book had been issued in her name. She testified that some of the deposits were of her money, and that other deposits were of money given her by her father. The latter had possession of the bank book, and drew on her account, but there was evidence that plaintiff had no knowledge of payments to the father. Held, that the question as to the ownership by plaintiff of such deposits should have been left to the jury. *Dickinson v. Leominster Savings Bank*, 152 Mass. 49; S. C., 25 N. E. Rep'r, 12.

5. *Negotiability of orders upon savings banks.*—An order on a savings bank bore upon its face memoranda showing that it was drawn on a specially deposited fund held by the bank subject to certain rules and regulations in force between it and the depositor, requiring previous notice of depositor's intention to draw upon the fund, return of the notice ticket, with the order to pay, and presentation of the deposit book, before payment could be required. Held, that the order was non-negotiable. *Iron City National Bank v. McCord*, 189 Penn. St. 52; S. C., 21 Atl. Rep'r, 143.

SNIDER'S SONS CO. v. TROY.

(Supreme Court of Alabama, Dec. 18, 1890.)

1. CORPORATIONS DE FACTO. HOW CONSTITUTED. A corporation *de facto* exists when, from irregularity or defect in its organization or constitution, or from some omission to comply with the conditions precedent, a corporation *de jure* is not created, but there has been a colorable compliance with the requirements of some law under which one association might be lawfully incorporated for the purposes and with the powers assumed, and a user of the rights claimed to be conferred by the law.

2. CONTRACT WITH DE FACTO CORPORATION. LIABILITY OF STOCKHOLDERS AS PARTNERS. A person who has entered into a contract with a *de facto* corporation in its corporate name and capacity, cannot in the absence of any averment of fraud, afterward disregard the existence of the corporation and sue the stockholders individually as partners on the contract.

APPEAL from circuit court, Montgomery county, John P. Hubbard, judge.

This action was brought by the appellant, against appellee, and sought to recover for goods sold to the Dispatch Publishing Company. The facts are sufficiently set forth in the opinion. To the complaint the defendant interposed a special plea, the substance of which is shown by the opinion, and the plaintiff demurred to this plea. On the consideration of the demurrer the court overruled it, to which the plaintiff duly excepted; and, the plaintiff refusing to plead further, judgment was entered for the defendant. The plaintiff now appeals, and assigns the ruling of the court on the demurrer and the judgment rendered as error.

E. P. Morrissett for appellant. *Tompkins & Troy* for appellee.

CLOFTON, J. A corporation *de facto* exists when, from irregularity or defect in the organization or constitution, or from some omission to comply with the conditions precedent, a corporation *de jure* is not created, but there has been a colorable compliance with the requirements of some law under which an association might be lawfully incorporated for the purposes and with the powers assumed, and a user of the rights claimed to be conferred by the law, when there is an organization with color of law, and the exercise of corporate franchises and functions. *M. E. Church v. Pickett*, 19 N. Y. 482; *Stout v. Zulick*, 48 N. J. Law, 599; 7

Atl. Rep'r, 362. The enabling law under which a corporation for the purposes and objects of the Dispatch Publishing Company, and with the powers assumed, might have been lawfully created at that time, is contained in sections 1803-1812 of the Code of 1876, and the amendatory acts, which authorize and provide for the incorporation of two or more persons desirous of forming a private corporation for the purpose of carrying on any industrial or other lawful business not otherwise specially provided for by law. Acts 1882-83, p. 40. The plea avers that defendant and two other named persons filed, September 2, 1885, with the judge of probate of Montgomery county, a written declaration, signed by themselves, setting forth substantially the matters required by the statute, except the residences of the persons; that they organized by the election of three directors, and commenced and continued to do business in a corporate capacity, and were so doing business when the debt sued for was contracted. If the averments of the plea be true, the truth of which is admitted by the demurrer, the Dispatch Publishing Company was an association having capital stock divided into shares, organized by the election of officers, and transacting business, and exercising franchises, functions and powers, after an attempted incorporation, as if it were a corporation *de jure*, a colorable compliance with the requirements of an existing and enabling law, and user of the rights claimed to be conferred thereby, the essential elements of a corporation *de facto*. Central A. & M. Assn. v. Alabama G. L. Ins. Co., 70 Ala. 120.

Appellant seeks by the action to hold defendant, who was a member, liable as a partner for paper and other supplies sold to the Dispatch Publishing Company. Whether the shareholders in a corporation *de facto* are individually liable for the corporate debts, in the absence of fraud or a statute, is a question as to which the authorities are in direct antagonism. In Cook Stocks, § 223, the doctrine asserted is: "A corporate creditor, seeking to enforce the payment of his debt, may ignore the existence of the corporation, and may proceed against the supposed stockholders as partners, by proving that the prescribed method of becoming incorporated was not complied with by the company in question." The leading cases supporting this doctrine are Bigelow v. Gregory, 73 Ill. 197; Abbott v. Smelting Co., 4 Neb. 416; Garnett

v. Richardson, 35 Ark. 144; Ferris v. Thaw, 72 Mo. 446; Ride-nour v. May, 40 Ohio St. 9; Coleman v. Coleman, 78 Ind. 344. We have omitted reference to a few cases, sometimes cited, for the reason that either the question of liability as partners was not before the court, as in Blanchard v. Kaull, 44 Cal. 440, or the debt was contracted before any steps were taken, other than the mere filing of a certificate, towards organization, as in Bergen v. Fishing Co. (N. J.), 3 Atl. Rep'r, 404, or it was contracted after the expiration of the charter by its own limitation without reorganization, as in Bank v. Landon, 45 N. Y. 410. In the case last cited, the shareholders entered into a special agreement, which by its terms created a partnership as to third persons.

In 2 Morawetz Private Corporations, section 748, the doctrine is stated as follows: "If an association assumes to enter into a contract in a corporate capacity, and the party dealing with the association contracts with it as if it were a corporation, the individual members cannot be charged as parties to the contract, either severally or jointly or as partners." The following cases maintain the doctrine that the members of a corporation *de facto* cannot be held liable as partners for the corporate debts: Fay v. Noble, 7 Cush. 188; Bank v. Almy, 117 Mass. 476; Stout v. Zulick, 48 N. J. Law, 599; 7 Atl. Rep'r, 362; Bank v. Padgett, 69 Ga. 164; Bank v. Stone, 38 Mich. 779; Humphreys v. Mooney, 5 Colo. 282; Bank v. Walker, 66 N. Y. 424; Coal Co. v. Maxwell, 22 Fed. Rep'r, 197; Whitney v. Wyman, 101 U. S. 392.

The plea and demurrer do not raise the question of the liability of the supposed stockholders, as partners, where there has been no intention or attempt to incorporate, where they are acting as a body corporate without even color of legislative authority, by sheer usurpation. The plea avers that the debt sued for was contracted by the Dispatch Publishing Company, which is alleged to have been a *de facto* corporation, and that plaintiff sold the goods to, and contracted with, the company as a corporation, knowing that it was doing business as such. The question before us, and the only question we propose to decide, is whether, there being no fraud alleged, nor statute making the stockholders individually liable, a creditor, who has dealt with a *de facto* corporation as a corporation, who has entered into contractual relations with it in its corporate name and capacity, can disregard the ex-

istence of the corporation, and, electing to treat it as a partnership, enforce the collection of his debt from the stockholders individually? The conflicting authorities afford aid in the solution of this question, only so far as their opinions may be in accord with settled principles and sustained by reason. Though it is an undecided question in this state, principles have been well settled which materially bear upon the inquiry, and mark the way to a correct conclusion. Corporations may exist either *de jure* or *de facto*. If of the latter class, they are under the protection of the same law, and governed by the same legal principles as those of the former, so long as the state acquiesces in their existence and exercise of corporate functions. A private citizen, whose rights are not invaded, and who has no cause of complaint, has no right to inquire collaterally into the legality of its existence. This can only be done in a direct proceeding on the part of the state, from whom is derived the right to exist as a corporation, and whose authority is usurped. This principle was clearly and emphatically declared in *Lehman v. Warner*, 61 Ala. 455, in the following language: "The corporation must of necessity be presumed to be rightfully in possession of the franchise, and rightfully to exercise the power which the legislative grant confers. Individual right is not invaded, if the negative is true in fact, and there is usurpation. It is the state — the sovereign — whose rights are invaded and whose authority is usurped. The individual could not create the corporation, could not grant, define, limit its powers, and no grant of these by the sovereign can lessen his rights. There can consequently be no cause of complaint by the citizen, and no right to inquire whether corporate existence is rightful *de jure* or merely colorable." *Taylor Corp.*, § 145; 4 Amer. & Eng. Enc. Law, 198. The creditor cannot proceed against the stockholders as partners, without proving non-compliance with prescribed conditions precedent, thus inquiring collaterally, not into the fact, but the legality, of its existence.

It is also an established rule of general application, that a party who contracts with a corporation, exercising corporate powers and performing corporate functions, existing as a *de facto* corporation, in its corporate name and capacity, will not be permitted in a suit on the contract to deny and disprove the rightfulness of its existence. 4 Amer. & Eng. Enc. Law, 198. In *Swart-*

wout v. Railroad Co., 24 Mich. 390, Cooley, J., declares the rule as follows: "Where there is thus a corporation *de facto*, with no want of legislative power to its due and legal existence, when it is proceeding in the performance of corporate functions, and the public are dealing with it on the supposition that it is what it professes to be, and the questions are only whether there has been exact regularity and strict compliance with the provisions of the law relating to corporations, it is plainly a dictate alike of justice and public policy, that, in controversies between the *de facto* corporation and those who have entered into contract relations with it, as corporators or otherwise, such questions should not be suffered to be raised." The general rule is thus stated by Brickell, C. J.: "Whoever contracts with a corporation in the use of corporate powers and franchises, and within the scope of such powers, is estopped from denying the existence of the corporation, or inquiring into the regularity of the corporate organization, when an enforcement of the contract, or of rights arising under it, is sought." Cahall v. Association, 61 Ala. 232; Central A. & M. Assn. v. Alabama G. L. Ins. Co.; 70 Ala. 120; Schloss v. Trade Co., 87 Ala. 411; 6 South. Rep'r, 360. It is conceded that the rule has been invoked and applied most frequently in suits against the stockholders or corporation, or persons who have contracted with it, where the stockholder, or corporation, or person, is seeking to avoid a liability by denying the legality of the corporate organization. But why should it not be applicable in other cases? Why should the stockholder be estopped in a suit by a creditor of an insolvent corporation to require payment of his unpaid subscription, and the creditor allowed to ignore the existence of the corporation, and proceed against the stockholder as a partner? Why should not the estoppel be mutual? Taylor, in his work on Corporations, section 148, having stated the general rule, that a corporation, when sued on its contract, and the person who contracted with it, when sued on his contract, is estopped to deny its legal incorporation, adds: "Furthermore, persons who have contracted with a corporation as such, and have acquired claims against it, are estopped from denying its corporate existence for the purpose of holding its shareholders liable as partners." And the same rule was applied in several of the cases cited above, in which a corporate creditor was seeking to hold the stockholder

liable as a partner for a corporate debt. The abrogation of the foregoing well-established rule is the logical sequence of maintaining a suit by a creditor of a *de facto* corporation, charging the stockholders as partners.

Another consideration. Section 8, article 14, of the constitution, declares: "In no case shall any stockholder be individually liable otherwise than for the unpaid stock owned by him or her." Exemption from liability other than for unpaid stock is the declared policy of the state. It cannot be imposed by legislation or by the judgment of a court. In view of the constitutional provision it is manifest that the shareholders of the Dispatch Publishing Company intended, by the attempt to incorporate, to avoid individual liability for the debts contracted by the corporation. When a party deals and contracts with a corporation as corporators, exemption from individual liability enters as an element of the contract. It is true that the liability of persons associated in an enterprise or adventure is not determinable by the name they may assume, but by the legal consequences of their acts. A partnership may arise as to third persons by mere operation of law, and contrary to the intention of the parties, but, to have the effect, the elements essential to constitute a partnership as to third persons must exist. A corporation *de facto* has an independent *status*, recognized by the law as distinct from that of its members. A partnership is not the necessary legal consequence of an abortive attempt at incorporation. As said in *Fay v. Noble*, *supra*: "Surely, it cannot be, in the absence of all fraudulent intent, that such a legal result follows as to fasten on parties involuntarily for such a cause, the enlarged liability of copartners, a liability neither contemplated nor assented to by them. The statement of the proposition carries with it a sufficient refutation." Maintenance of such suit involves judicial nullification of franchises and powers enjoyed and exercised by a *de facto* corporation as a distinct entity recognized by the law, acquiesced in by the state; defeats the corporate character of the contract; changes the relation from that of stockholders to that of partners; substitutes other and new parties to the contract; effects the imposition of an enlarged liability, which they did not assume, but intended to avoid, so understood by the creditor when he contracted the debt with the corporation as such. The contract is valid and binding

on the corporation, which the creditor trusted. No injustice is done him, for all his rights and remedies are preserved by the principle, that the corporation and the shareholder are estopped from denying its legal existence, as against him. It will not answer to say that he is not repudiating, but enforcing, the contract. He repudiates the party, the corporation, with which he made the contract, and seeks its enforcement against parties who never entered into contractual relation with him. The doctrine that a creditor who has dealt with a *de facto* corporation in its corporate capacity cannot charge the stockholders as partners with the corporate debt, there being no fraudulent intent alleged and proved, seems to us to be sustained by the weight of authority, maintained by stronger reasoning consistent with well-settled principles, and in harmony with the policy of the state. Affirmed.*

Corporations de facto.—The subject of *de facto* corporations is fully considered in note to *Vanneman v. Young*, 3 Am. R. R. & Corp. Rep. 660. We note the following recent decisions: A stockholder cannot be sued individually for the price of goods sold to a *de facto* corporation as such on the ground that it was not legally incorporated. *Cory v. Lee*, (Ala.) 8 South. Rep'r, 694. A certificate of incorporation provided that the corporate affairs should be controlled by its president, vice-president and attorney, instead of providing for a board of directors or trustees, as required by General Statutes Colorado 1888, section 238, held insufficient to create a corporation *de jure*; also that one who signed such certificate, conveyed property to the company, and acted as one of its officers, was estopped from denying its *de facto* existence. *Bates v. Wilson*, 14 Colo. 140; 24 Pac. Rep'r, 99. See, also, *Baltimore, etc., R. Co. v. Fifth Baptist Church*, 137 U. S. 568; 11 Sup. Ct. Rep'r, 185.

SMALL V. MINNEAPOLIS ELECTRO MATRIX Co. ET AL.

(Supreme Court of Minnesota, Jan. 16, 1891.)

1. CORPORATION. LEASE OF ALL ITS PROPERTY TO FOREIGN CORPORATION, RIGHTS OF STOCKHOLDERS. A resolution of a board of directors of a domestic corporation contemplated (if ratified at a meeting of stockholders called for that purpose) a transfer of its property and a surrender of the management of its business to a foreign corporation for the period of twenty-five years, in consideration of a specified percentage of the proceeds to be paid by the latter. Held, that at the suit of a non-assenting stockholder of the domestic corporation, such contemplated acts should be enjoined.

* Reported in 8 So. Rep'r, 668.

A PPEAL from district court, Hennepin county, Lochren and Smith, judges.

Hart & Brewer and *C. J. Bartleson* for appellants. *Cross, Carlton & Cross* (*J. M. Shaw* of counsel) for respondent.

DICKINSON, J. The Minneapolis Electro Matrix Company is a Minnesota corporation, of which the plaintiff, and the several individual defendants who have answered in this action, are the stockholders and directors. The American Electro Matrix Company is a foreign corporation, organized and existing under the general laws of the State of New Jersey. For the sake of brevity, the former corporation will be hereinafter designated as the "Minneapolis Company" and the latter as the "American Company." The case is here on appeal by the Minneapolis Company and the individual defendants above referred to, from an order refusing to dissolve a temporary injunction. Speaking comprehensively, it may be said that the injunction restrained the Minneapolis Company and the individual defendants, its directors and stockholders, from carrying into effect a resolution of the board of directors, which, as set forth in the answers of the appellants, was as follows: "Resolved, that the directors of the Minneapolis Electro Matrix Company recommend to the stockholders of the company the adoption of the following proposition from the American Electro Matrix Company: 'That the Minneapolis Electro Matrix Company lease for twenty-five years whatever rights and property of every description it has under the laws of Minnesota a right to lease, to the American Electro Matrix Company, a corporation organized under the laws of the state of New Jersey, upon the following terms, namely: The American Electro Matrix Company shall assume and pay all indebtedness of this company, and meet all obligations arising under any contracts made by it; shall furnish all capital that may be required for the prompt prosecution of its patent applications, interferences or other suits, for the speedy development of its business in this country, for the negotiation of franchises in foreign countries on the best possible terms, and for the manufacture of machines in the most speedy and perfect manner; shall bring into the direction and practical management men of high reputation and business experience, and shall enlist in the different states the active

co-operation of efficient men, through organization of franchise companies or otherwise if more desirable arrangements for the interests of this company can be made; and shall pay to the Minneapolis Electro Matrix Company one-half of the net receipts from all sources, after deducting all expenditures under the provisions of this lease.' Resolved, that T. C. Bates, Erastus Wiman and C. W. Davidson be a committee to prepare in conference with the American Electro Matrix Company, and with the advice of Duncan, Curtis & Page, on behalf of this company, a lease in accordance with the above terms, to be executed on behalf of this company by its officers upon the approval of the stockholders at a meeting hereby called to be held at Minneapolis." After the adoption of these resolutions, a meeting of the stockholders was called to take action upon this matter. By the injunction, as subsequently modified, the Minneapolis Company and its directors were restrained from executing a lease or transfer of its franchises or property to the American Company, and the stockholders were enjoined from voting to ratify any such lease or transfer; but it was expressly provided that the corporation should not be thereby prohibited from carrying on its ordinary and lawful business through its board of directors and its officers in its accustomed, usual and lawful manner, retaining to itself the control and management of its affairs. The facts bearing upon the propriety of the injunction are disclosed only so far as as they are set forth in the pleadings.

The precise purposes for which the Minneapolis Company was organized are not stated in the pleadings of either party. The facts are disclosed, however, that the corporation owns valuable patents for a new system of printing, which it purchased by the issue of the entire amount of its authorized capital stock—\$1,000,000; and the answers of the defendants justify the inference that the proper business of the corporation consisted in part, if not principally, in the construction of machines or apparatus for printing, under such patents, and in introducing them into use by others so as to derive a royalty therefrom. But however this may be, and whatever may have been the particular nature and scope of the purposes for which this organization was effected, we are of the opinion that the learned judges of the district court were right in considering the acts to which the injunction was

directed as being a violation of the legal rights of the plaintiff as a stockholder of the corporation, in that the carrying into effect of what was contemplated in these resolutions would have been substantially a surrender and transfer of the property and business of the Minneapolis Company to another and foreign corporation; not for the purposes of winding up the affairs of the former, and distributing its property to those who would in that event be entitled to it, but in order that the business which this corporation was organized to prosecute might be for the period named carried on by the foreign corporation, in consideration of a percentage of the proceeds of the business to be paid by it. That such was the purpose contemplated seems very apparent from the terms of the resolution above recited. It is to be assumed from the pleadings and from the resolution itself that this corporation was organized for the purpose of carrying on some business, whatever its precise nature may have been, and the resolution discloses the purpose that for the period of twenty-five years such business should not be conducted by the Minnesota corporation, but that it should be taken up and carried on solely by the American Company. As justifying these conclusions, it is only necessary that attention be directed to the facts that the transfer of rights and property is to be for the period of twenty-five years; that the American Company is to assume and pay all the debts and perform all the contract obligations of the Minneapolis Company: shall furnish the capital for the prosecution of the patent applications of the domestic corporation, for the conduct of its suits, the speedy development of its business, for the negotiation of franchises, the manufacture of machines, and to pay to the Minnesota corporation, whose continued existence is plainly contemplated, a specified percentage of the proceeds of the business. Other provisions, recited above, but not here again referred to, go to support the conclusions announced. We need not inquire how far, or under what circumstances, considerations of public policy and of the general interests of the state may affect the right of a corporation to discontinue the business for which it was created, and to surrender to another corporation its property and the conduct of such business. We do decide that such a surrender of the property, and, so far as possible, of the functions, of a corporation, in order that, while it is to still continue in existence, its business may be carried on by another

corporation, to which such transfer is made, would violate the rights of a non-assenting stockholder arising from the contract, implied if not expressed, in the creation of such an organization; and he would be entitled to have such acts restrained by injunction. *Stewart v. Transportation Co.*, 17 Minn. 372, 398 (Gil. 348); *Cook Stocks*, §§ 667, 668; 1 *Mor. Priv. Corp.*, §§ 413, 416; *Black v. Canal Co.*, 24 N. J. Eq. 456; *Zabriskie v. Railroad*, 18 N. J. Eq. 178; *Abbot v. Rubber Co.*, 33 Barb. 578; *Middlesex R. Co. v. Boston & O. R. Co.*, 115 Mass. 347.

In the absence of express provision to the contrary, it is to be considered as the law concerning business corporations that their affairs are to be managed in the interest of their stockholders, and by directors or agents appointed by them. This is to be taken to be implied in the contract, unless in some manner a different intention is expressed. It is not to be inferred from the pleadings in this case, even if such a thing be possible, that the original purposes of this corporation may have included the project of surrendering its business to some other corporation, to be carried on for a period of years by the latter, under the direction and control of its officers and stockholders, the stockholders of the company thus transferring its business having no voice in the selection of such officers nor in the management of the business. If in fact the contract involved in the corporate organization did express any such extraordinary purpose as the committing of the business and interests of this company to the sole management and control of strangers to this corporation and its stockholders, for a period of twenty-five years, we think that it was incumbent upon the defendants, upon this motion to dissolve the injunction, to show that fact by presenting the articles of incorporation.

The order appealed from is affirmed.*

Power of directors or majority of stockholders to lease or sell property essential to the corporate purposes.— Whether a majority of the directors or stockholders of a solvent trading or manufacturing corporation may, in the absence of special statutory authority, wind up its affairs and abandon its franchises, is a question upon which there is some difference of opinion. *Treadwell v. Salisbury Manuf. Co.* 7 Gray, 398; *McCurdy v. Myers*, 44 Penn. St. 535; *Merchants & Planters' Line v. Wagoner*, 71 Ala. 531; *Mobile & Ohio R. Co. v. Steele*, 29 Ala. 573; *Curien v. Santini*, 16 La. Ann. 27; *Cook Stocks, etc.*, § 630; *Taylor Corp.*, §§ 431, 610; 1 *Mor. Corp.*, § 418; *Angell & A. Corp.*, § 772. In the case first cited the court says: "But we entertain no

* Reported in 47 N. W. Rep'r, 797; 45 Minn. 264.

doubt of the right of a corporation, established solely for trading and manufacturing purposes, by a vote of the majority of their stockholders, to wind up their affairs and close their business, if in the exercise of a sound discretion they deem it expedient so to do. At common law, the right of corporations, acting by a majority of their stockholders, to sell their property is absolute, and is not limited as to objects, circumstances or quantity. *Angell & A. Corp.* 127 et seq.; 2 Kent Com. (6th ed.) 280; *Mayor, etc., of Colchester v. Lowton*, 1 Ves. & B. 236, 240, 244; *Binney's Case*, 2 Bland, 142. To this general rule there are many exceptions, arising from the nature of particular corporations, the purposes for which they were created, and the duties and liabilities imposed on them by their charters. Corporations established for objects *quasi* public, such as railway, canal and turnpike corporations, to which the right of eminent domain and other large privileges are granted in order to enable them to accommodate the public, may fall within the exception; as also, charitable and religious bodies, in the administration of whose affairs the community or some portion of it has an interest to see that their corporate duties are properly discharged. Such corporations may, perhaps, be restrained from alienating their property, and compelled to appropriate it to specific uses, by *mandamus* or other proper process. But it is not so with corporations of a private character, established solely for trading and manufacturing purposes. Neither the public nor the legislature have any direct interest in their business or its management. These are committed solely to the stockholders, who have a pecuniary stake in the proper conduct of their affairs. By accepting a charter they do not undertake to carry on the business for which they are incorporated, indefinitely, and without any regard to the condition of their corporate property. Public policy does not require them to go on at a loss. On the contrary, it would seem very clearly for the public welfare, as well as for the interests of the stockholders, that they should cease to transact business as soon as, in the exercise of a sound judgment, it is found that it cannot be prudently continued. If this be not so, we do not see that any limit could be put to the business of a trading corporation, short of the entire loss or destruction of the corporate property. The stockholders could be compelled to carry it on until it came to actual insolvency. Such a doctrine is without any support in reason or authority." *Treadwell & Another v. Salisbury Manufacturing Co. & Others*, 7 Gray, 393, 404-405.

This case, which is, perhaps, the strongest one cited in support of the power of the majority to wind up a corporation in its discretion, nevertheless impliedly supports the doctrine that this cannot be done unless the affairs of the corporation are in such a condition as renders it imprudent or of doubtful advantage to continue business. See *Abbott v. Am. Hard Rubber Co.*, 33 Barb. 578, 583; *Kean v. Johnson*, 9 N. J. Eq. 401; *Zabriskie v. Hackensack & New York R. Co.*, 18 N. J. Eq. 183; *Van Schmidt v. Huntington*, 1 Cal. 55.

So a corporation, acting through its directors or a majority of its stockholders, may make an assignment for the benefit of its creditors, or turn over its property in payment of its debts, or otherwise dispose of it for that purpose. *Caltine v. Eagle Bank*, 6 Conn. 233; *Reichwald v. Commercial Hotel Co.*, 106 Ill. 439; *State v. Bank of Maryland*, 6 G. & J. 205; *DeCamp v. Alward*, 53 Ind. 468; *Hill v. Fogg*, 41 Mo. 563; *Kansas City Hotel Co. v. Sauer*, 65 Mo. 279; *Chew v. Ellingwood*, 86 Mo. 260; *Hutchinson v. Green*, 91 Mo. 367;

Sheldon Hat Blocking Co. v. Eickemeyer Hat Blocking Co., 56 How. Pr. 70; Dana v. Bank of U. S., 5 W. & S. 223; Wilson v. Proprietors of Central Bridge, 9 R. I. 590; Hancock v. Holbrook, 9 Fed. Rep'r, 353. But see Smith v. New York Consol. Stage Co., 18 Abb. Pr. 419. In other words, a corporation may pay its debts, or provide for their payment, in the same manner as an individual, and the directors may exercise this power even against the protest of the stockholders. Hutchinson v. Green, 91 Mo. 367.

Except in the cases above mentioned, that is, either for the purpose of winding up the corporation in good faith or for paying its debts, neither the directors nor a majority of its stockholders have power, as against a dissenting minority, by sale or lease, to dispose of any part of the corporate property which is essential to enable it to carry on its business or fulfill its corporate purposes. Rollins v. Clay, 33 Me. 132; Middlesex Railroad Co. v. Boston & Chelsea R. Co., 115 Mass. 347; Matter of Franklin Tel. Co., 119 Mass. 447; Brewer v. Boston Theater, 104 Mass. 378; New Orleans, etc., R. Co. v. Harris, 27 Miss. 517; Buford v. Keokuk Northern Line Packet Co., 3 Mo. App. 159; Abbott v. Am. Hard Rubber Co., 33 Barb. 578; S. C., 21 How. Pr. 198, and 20 How. Pr. 199; Conro v. Port Henry Iron Co., 12 Barb. 27; Copeland v. Citizens' Gas Light Co., 61 Barb. 60; Kelly v. Mariposa Land & Min. Co., 4 Hun, 632; Troy, etc., R. Co. v. Boston, etc., R. Co., 86 N. Y. 107; Abbott v. Johnstown, etc., R. Co., 80 N. Y. 27; Kean v. Johnson, 9 N. J. Eq. 401; Black v. Del. & R. Canal Co., 24 N. J. Eq. 455, reversing 23 N. J. Eq. 180 and 415; Wilson v. Proprietors of Central Bridge, 9 R. I. 590; Boston, etc., R. Co., v. New York, etc., R. Co., 13 R. I. 260; Lanman v. Lebanon Valley R. Co., 30 Penn. St. 42; Balliet v. Brown, 103 Penn. St. 546; Oregon Ry., etc., Co. v. Oregonian Ry. Co., 180 U. S. 1; Pennsylvania R. Co. v. St. Louis, etc., R. Co., 118 U. S. 290; Thomas v. Railroad Co., 101 U. S. 71; Erwin v. Oregon Ry., etc., Co., 27 Fed. Rep'r, 625. See, also, Central Transportation Co. v. Pullman Palace Car Co., post.

In Buford v. Keokuk, etc., Packet Co., 3 Mo. App. 159, the court says: "It appears to be settled as a general rule that the officers of a corporation cannot, against the wishes of a single stockholder, convey away the entire property from which the corporation derives its emoluments, and which is essential to the business purposes of its organization. The right of the stockholder in this regard is founded upon contract. He has invested his means upon an agreement with his fellow-corporators, that they shall be devoted to promotion of the general objects defined in the charter. He must yield to the will of the majority in whatever conforms to the tenor of this agreement, as being directed to the successful prosecution of the common enterprise. But, when asked to submit to a process which effectually annihilates the enterprise, and diverts his contribution into a channel never contemplated by him, the courts will protect him to the letter of his reserved rights." * * * The rule, however, may be subjected to certain modifications in the application. *Cessante ratione cessat lex*. The contract of the stockholder cannot imply that the business of the corporation must be persistently kept up, to the ruin of all concerned. The understanding and intent of the other contracting parties must also be considered. A mine worked by a joint-stock company may become wholly exhausted. A willful or obstinate stockholder could hardly prevail against the majority, who should determine upon a sale of the useless machinery for distribution of proceeds to creditors and stockholders, rather than to throw

away all their remaining capital in operating it, with no possibility of beneficial result." Pages 166-7.

In *Abbott v. American Hard Rubber Co.*, 33 Barb. 578, the defendant company by its board of directors transferred all its property and patent rights, except its real estate and factory, which it leased to the purchasers of the property. It was held that even if the transaction was authorized by a majority of the stockholders, the transfer was void as to stockholders not consenting thereto. The court says: "I do not think the directors, even with the consent of a majority of the stockholders, had a right as against stockholders not consenting, thus in effect to discontinue its existence and defeat the object of its organization. I must assume that these directors were chosen to manage the business of the corporation, not to destroy and end it. If the corporation was insolvent, it is presumed the laws of Connecticut had provided a mode of having it dissolved; if it had good cause to surrender up its franchises to the government, it is presumed the laws of the same state had also provided for that; but I cannot presume that the directors, or a majority of the stockholders of this corporation, by any laws of Connecticut, or otherwise, had a right thus, by *voluntary* sale, to discontinue its existence, and in effect surrender its franchise, without consulting the government, or its creditors, and without the consent of a minority of its stockholders. To hold that the directors could thus discontinue, wind up and defeat the purpose, object and business for which the corporation was organized, even with the consent of a majority of the stockholders, so as to bind the minority not consenting, would in effect be depriving the minority, and every one of the minority, of their property without their consent. No doubt the principle that a majority must govern or control in the absence of any special provision in the charter, or constitutional articles, applies to corporations, and that the minority are bound by the acts of the majority, when those acts are within and according to the charter or constitutional articles of the corporation, *and not inconsistent with the object and purpose with which it was organized*. Such acts a stockholder consents to by becoming a member of the corporation, because he is presumed to know the law and the rights of the majority by the law. But this democratic or representative principle does not apply to an act or acts of the majority, inconsistent with a continued existence of the corporation and the very objects and purpose for which it was organized, nor does a stockholder consent to such acts by becoming a member, because the law does not justify them; and he cannot be presumed to have anticipated or thought that such acts would ever be perpetrated or attempted by the majority."

In *Copeland v. Citizens' Gas Light Co.*, 61 Barb. 60, a lease by one gas company to another of all its property for five years, was set aside at the suit of a dissenting stockholder. So in *Conro v. Port Huron Iron Co.*, 12 Barb. 27, a lease of all the corporate property to the president of the company for two and a half years. A lease by one horse railroad company to another of all its property and franchises for a term of years was held to be *ultra vires* and void, in *Middlesex R. Co. v. Boston & Chelsea R. Co.*, 115 Mass. 347. To the same effect are *Boston, etc., R. Co. v. New York, etc., R. Co.*, 13 R. I. 260, and *Black v. Del. & R. Canal Co.*, 24 N. J. Eq. 455.

The rights of the dissenting stockholder, in such cases, being founded upon

contract, it follows that even the legislature cannot compel him to submit to such a change in his interest in the corporation. *Boston, etc., R. Co. v. New York, etc., R. Co.*, 18 R. I. 260; *Zabriskie v. Hackensack, etc., R. Co.*, 18 N. J. Eq. 178.

But a stockholder's interest in corporate property may be taken for a public purpose upon just compensation being made or provided. *Black v. Del. & R. Canal Co.*, 24 N. J. Eq. 455; *Lanman v. Lebanon Valley R. Co.*, 30 Penn. St. 42.

A lease of a railroad *in perpetuum* to another company, dissenting stockholders to receive stock of the lessee company or money on a certain fixed basis, not agreed to by them, was held void as to such dissenting stockholders, though ratified by the legislature. *Boston, etc., R. Co. v. New York, etc., R. Co.*, 18 R. I. 260. "Such an arbitrary deprivation of property," says the court, "cannot be within the power of a majority in a corporation to direct or of a legislature to ratify. If this could be upheld no investment in a corporation would be secure, for any minority could be deprived of their property by a vote of a majority confirmed by legislative act, without the requirement of public necessity, and without provision for just compensation."

In the case of *Ardesco Oil Co. v. North Am. Oil & Min. Co.*, 66 Penn. St. 875, it appeared that the North American Company became the owner of a lease of certain coal lands having about fourteen years to run. At a time when it was much indebted it sub-let the property to the Ardesco Oil Company for two years. In an action of covenant by the former company against the latter, the defense was made that the lease was void for want of power in the North American Company to make it. Upon this point the supreme court says: "It is supposed that a company chartered for the purpose of manufacturing and refining oil cannot lease its entire property and so defeat the very purpose for which its charter was granted. But corporations, unless expressly restrained by the act which establishes them, or some other act of assembly, have and always have had, an unlimited power over their respective properties, and may alienate and dispose of the same as fully as any individual may do in respect to his own property. Hence, an insolvent corporation may make a general assignment for the benefit of its creditors, and this power may be exercised by the directors, unless special provision to the contrary is made in the charter. *Dana v. The Bank of the United States*, 5 W. & S. 228. If they can alienate absolutely, they may lease, which is but a partial or temporary alienation."

This general language must be limited to the case before the court. So far as appears there was no dissenting stockholder, and the defendant could not set up a violation of trust on the part of the directors in which it had participated, and of which the stockholders did not complain.

The right of a stockholder to set aside an unauthorized sale or lease of the corporate property may be lost by delay in asserting his rights. *Sheldon Hat Blocking Co. v. Eickemeyer Hat Blocking Machine Co.*, 90 N. Y. 607.

"The acts of a corporation which are not *per se* illegal, or *malum prohibitum*, but which are *ultra vires*, affecting, however, only the interests of the stockholders, may be made good by the assent of the stockholders, so that strangers to them, dealing in good faith with the corporation, will be protected in a reliance on these acts. That it is not needed in such a case that there be an express assent on the part of the stockholders to work an equitable estop-

pel upon them. When they neglect to promptly and actively condemn the unauthorized act, and to seek judicial redress after knowledge of the committal of it, this will be deemed an acquiescence in it, and if innocent third persons have been led thereby to put themselves in a position from which they cannot be taken, without loss, if the act were held invalid, the stockholders will be estopped from questioning it." *Sheldon H. B. Co. v. Eickemeyer H. B. M. Co.*, 90 N. Y. 607, 613, 614.

TRISCONTI V. WINSHIP ET AL.

(Supreme Court of Louisiana, Jan. 19, 1891.)

1. CORPORATIONS. LIABILITY OF DIRECTORS TO STOCKHOLDERS. The motives and expediency which prompt the acts of a board of directors, done within the lawful scope of their powers and authority, are beyond judicial scrutiny and appreciation.

2. SALE OF STOCK TO A "TRUST." Stockholders have the indisputable and uncontrollable right of disposing, at their pleasure, of their shares in the corporation.

3. Members of a board of directors, who are necessarily shareholders, enjoy, like the other corporators, the right to dispose of their stock, and individually are amenable to no account.

4. RIGHT OF MAJORITY TO WIND UP AFFAIRS OF CORPORATION. A majority of the stockholders, whose vote is duly expressed, has the power to determine that the business of the concern shall be stopped altogether, and its affairs liquidated, in the absence of any adverse prohibition or provision in the charter or in the law.

5. A board of directors which, in furtherance of the vote of the required majority, directs a total cessation of the business of the corporation and a liquidation of its affairs, acts within the sphere of its lawful authority, and is not chargeable with any loss which the measure, in its execution, may entail on the minority.

A PPEAL from civil district court, parish of Orleans, Monroe, judge.

Leonard, Marks & Bruenn and *B. K. Miller* for appellant.
Bayne, Denegre & Bayne and *T. J. Semmes & Legendre* for appellees.

BERMUDEZ, C. J. The pith of the elaborate incriminating petition in this case is that the plaintiff, as a stockholder of the Bienville Oil-Works Company, has, in consequence of ill practices in dereliction and violation of duty of the directors of that corporation, aided and abetted therein by the representatives of

an oil trust organization, sustained such grave injury that his shares (25) have become valueless. He, therefore, prays for judgment against those directors and representatives *in solido* for the loss inflicted, namely, at least the value of the stock at par, viz., \$2,500. The petition was accompanied by interrogatories on facts and articles designed to elicit from the parties sued significant matters in support of the averments.

The defenses set up are that the claim is one sounding in damages arising *ex delicto*, and, as such, is barred by the prescription of one year; that if injury was occasioned as charged, it was sustained by the mass of the stockholders alike and by no one in particular, as distinguishable from that done to the others, and the plaintiff has no right of action; that the facts alleged are not true, and not proved, and, if so, that the directors, in their individual capacity, had the right to act as they did; that officially they merely executed the will of a majority of the stockholders legally expressed in suspending the further operating or working of the company, and disposing of its assets, and discharging its liabilities, by a liquidation of its affairs. On behalf of the parties who are asked to be cited as representing the oil trust it is urged that they do not represent that organization, which has, therefore, not been reached by the process of the court; that, as holders of certificates issued by the concern, they cannot, under any circumstances, be held responsible, as is attempted to be done. In an elaborate and well-prepared opinion the industrious and able district judge has unfolded the condition of the affairs of the Bienville Oil-Works Company from their incipency down to their discomfiture. He has passed on the merits of the case as to the directors, and, as concerns the alleged representatives of the trust, he has held that it was not in court in this litigation, and declined to entertain the action against it, concluding that the certificate-holders could not be made liable, as was sought. From the judgment thus rendered, the plaintiff has appealed.

The *gravamen* of the complaint seems to be that the directors of the Bienville Oil-Works Company, by a secret and fraudulent combination and bargain with the American Oil Trust, an alleged unlawful organization, transferred their stock in the company to the latter, to subserve its own interests, and, in disregard of their obligations to the other stockholders, and in violation of their

rights, have thus wrecked the company, thereby destroying the value of its stock other than that held by the trust. The following are the salient facts of the case: In 1871 the Bienville Oil-Works Company was organized in New Orleans. For some time it was in a flourishing condition, and did prosperous business, which, however, in the course of time, finally declined, so that the stock was worth 60 only, on the 1st of July, 1886, when, some days latter, a liquidation having been decided upon, it sank to little or nothing. In 1884 certain parties had created an American Cotton Oil Trust, the purpose of which was the acquisition of oil-mills and refineries. Certificates of stock for upwards of forty millions were issued as a means to acquire the shares of stockholders in the oil factories in contemplation. By using the certificates in that manner parties charged with representing the trust succeeded in acquiring a majority of the stock of the Bienville Oil-Works Company, the stock remaining in their names, or in that of appointed persons, and not put in that of the trust. At this juncture the stockholders, by the required majority, considering that it was their own interest as well as that of the other stockholders who would not concur to suspend absolutely or stop permanently the working of the mill and to liquidate its affairs, did so ordain; and the directors acted in furtherance of that decision, the result being that the realized assets proved barely sufficient to meet the debts of the defunct corporation. Indisputably the stockholders of the Bienville Oil-Works Company, including the directors who, necessarily were such, had the right to dispose, at their pleasure, of the shares which they owned in the corporation.

There exists no law which requires that a mercantile organization shall continue in business, however ruinous, when the majority of the stockholders, as fixed by the charter, or by the law, when not so fixed, deem that it is their interest not to go on further, and to wind up its affairs. Section 687, Revised Statutes expressly authorizes three-fourths of the stockholders of a corporation to dissolve it altogether. The power and rights of such majority in this respect are placed beyond judicial supervision and control. The discretion is absolute in them, and the minority have no occasion legally to complain. By their accepting the terms of the charter and the laws under which the same was framed and the body organized, the award of the majority becomes that of a power of the

choice and selection of the stockholders, to which the minority must submit. In the absence of any express statutory prohibition, a majority of the stockholders may wind it up, for reasons by them deemed sufficient, the moment that they act within the scope of their legal attributions. 1 Mor. Priv. Corp. 413, 414; *Oglesby v. Attrill*, 105 U. S. 610; *Bailey v. Railroad Co.*, 12 Beav. 433. The action of the majority in the instant case being lawful, as done with legal sanction and authority, this court is powerless to inquire into and determine of its expediency or the sufficiency of the motives which prompted and dictated it without transforming itself into the corporation and acting as its board of administrators, which it surely cannot do. No doubt the shares owned by the plaintiff and purchased at a premium became depreciated, and went down gradually, so as finally to be reduced to nothing; but for this he has no one to blame but himself. He could have done as the other stockholders did—exchanged them for certificates; but he has not chosen so to do. Had he done so, he would have realized the fabulous profits which he says they have and which he regrets not having reaped. If he knew of the opportunity he should have availed himself of it, and if he knew not of it, it is his own misfortune. He should have been more vigilant, and not slept on his chances. Surely purchasers of stock are under no obligation to admonish or give notice in advance of their intention to invest, for this would be detrimental to their interest. The evidence establishes that after the transaction had apparently terminated the plaintiff proposed to sell his stock, and was offered 30 per share, which he declined, asking for more. Had he accepted he would not be to-day an unfortunate and improvident loser, whose condition cannot be improved. This view of the case relieves us from considering the pleas of prescription and no right of action, set up by the defendants. Judgment affirmed.*

See *Mason v. Pewabic Min. Co.*, 1 Am. R. R. & Corp. Rep. 227, and note; *Baltimore, etc., R. Co. v. Cannon*, 3 Am. R. R. & Corp. Rep. 202; *Small v. Minneapolis Electro Matrix Co.*, ante, p. ———.

* Reported in 9 So. Rep'r, 29.

NEWGASS V. ST. LOUIS, A. & T. RY. CO.

(Supreme Court of Arkansas, Jan. 17, 1891.)

1. EMINENT DOMAIN. TIME WITH REFERENCE TO WHICH DAMAGES SHOULD BE ASSESSED. On the condemnation of land taken by a railroad company for its right of way, the damages are to be assessed as of the time of the filing of the petition, and not the time of the original entry, nor of the award.

2. There being evidence that the land had advanced in value between the entry and the filing of the petition, error in assessing the damages as of the earlier date was prejudicial to the land-owner.

3. ADDITIONAL FENCES AS AN ELEMENT OF DAMAGES. There being no evidence that, to use and enjoy the land as it would probably be used in the future, any additional fences would be made necessary, there is no error in a charge that the land-owner is entitled to nothing for fences.

4. DAMAGES BY FLOODING, WHEN PROPERLY INCLUDED. If the appropriation of a part and its use as a railroad results in flooding the land not taken, the damages so occasioned should be included in the assessment, but no account should be taken of injuries which may result from an improper construction or maintenance of the road-bed.

5. VALUE OF RAILROAD CONSTRUCTED BEFORE CONDEMNATION. The value of a railroad already constructed on the land by the railroad company or its vendors is not to be included in the damages assessed, and in determining the value of the land taken any appreciation or deterioration that may have resulted to it specially from the building of the road on it will be disregarded, but such as may thereby have resulted to it in common with other lands in the neighborhood will be considered.

6. INTEREST. The railroad company having been in the enjoyment of the land, the damages assessed will bear interest from the filing of the petition.

A PPEAL from circuit court, Jefferson county, John A. Williams, judge.

Morris M. Cohn for appellant. *J. M. & J. G. Taylor* and *Sam. H. West* for appellee.

HEMINGWAY, J. This appeal presents for our consideration three alleged errors, all relating to the rule adopted by the court below for assessing the amount to be paid appellant as compensation for taking his land for a railroad.

1. It is insisted that compensation should have been assessed with reference to the value of the land taken as of the time of filing the petition, and not as of the time of the entry upon the land by the corporation. Upon this question the courts in different states have established different rules. It is held by some

that the assessment should be made with reference to the time of entry; by others with reference to the time of filing the petition; and by still others with reference to the time of the award. *Lewis Em. Dom.*, § 477, and cases cited. The court below adopted the first rule, against the objection of the appellant, who contended for the second one. We recall no case in which the question has been presented for the decision of this court; but there are references by the court to it, and in so far as they indicate an opinion it is favorable to the contention of appellant. Either rule is liable to operate harshly in special cases — as well against the land-owner as the corporation; but we see nothing in the one contended for which indicates that it would more often work harshly than either of the others, and it has the advantage of fixing a certain and definite time with reference to which the estimate must be made. Besides, the corporation has the right to acquire the land. When it files its petition it declares its purpose to appropriate it, and to render just compensation to the owner. Until it has done that it is in default, but afterward it can do nothing more until, in the regular course of procedure of the courts, a legal ascertainment of the amount to be paid is made. As the filing of the petition is the attempt to assert the right of condemnation, and subsequent delay is without fault of either party, it seems fair to each alike that the assessment should be made with reference to value as of that date. *Lewis Em. Dom.*, § 477, and cases cited; *Burt v. Insurance Co.*, 115 Mass. 1; *Commissioners v. Dunlevy*, 91 Ill. 49. There was evidence tending to prove that the land had advanced in value between the time of entry and that of filing the petition, and we cannot hold that the error of the court in making its assessment with reference to the earliest date did not prejudice the appellant. For this error the judgment must be reversed, and as the other points raised will be presented in the future trial of the cause it is proper that we determine them.

2. It is assigned as error that the court ruled "that Newgass was entitled to recover nothing for fences or overflow." The appellant was entitled to be compensated for the taking of his land; to no more and to no less. If the taking impaired the value of his contiguous land he was entitled to be compensated to the extent of such impairment, in addition to the value of that

taken. If, in view of the probable future use of the remainder, additional fencing would be necessary, and this fact rendered it less valuable than it would otherwise have been, then such fact would be an element of damage. But the damage is not necessarily the cost of increased fencing, but the amount of depreciation in the value of the land, caused by the increased burden upon its use. There is nothing in the proof to show that in order to use and enjoy the lands as they probably would be used in future any additional fencing would be necessary. There was, therefore, no error in the court's ruling in that regard. *Lewis Em. Dom.*, § 498, and cases cited; *Railway v. Combs*, 51 Ark. 324; 11 S. W. Rep'r, 418. If the appropriation of the part and its use as a railroad resulted in flooding the remainder of appellant's lands, the damage so occasioned should be included in the assessment; but no account should be taken of injuries thereafter to result from an improper construction or maintenance of the bed, for the condemnation does not authorize either, and the corporation that condemns the land will be liable for such injuries as may thereafter result therefrom. *Railway v. Rhea*, 44 Ark. 258; *Railway Co. v. Henry*, 44 Ark. 360.

3. It is insisted that the court erred in refusing to include in its estimate of the value of the land taken the value of a railroad previously constructed upon it by the appellee or its vendors. It was argued that the railroad was built on it by a trespasser; that it became a part of the land, and, as such, passed to the landowner; that when the petition was filed the railroad was as much the property of the appellant as the soil itself, and could not be taken from him without just compensation. There is an old maxim that "whatever is affixed to the soil belongs to the soil;" and it is a general rule of the common law that a trespasser who builds on another's land dedicates his structure to the owner. The reason of the rule, which has been often stated, is that the entry was a trespass to the injury of the owner, and that the trespasser could not add further injury by tearing down and removing the building, for in that the law contemplates that an injury to the soil will result as a necessity. The trespasser has no legal right to acquire the soil, and, when he places on it a building which cannot be removed without some injury to it, it will be presumed that he intended to dedicate the building to the use of

the land, and not that he contemplated a second trespass. He could not remove the building, for its severance would damage the soil ; he could not exact pay for it, for he could not impose upon the owner of the soil an obligation to pay for improvements which he had not authorized and may not have desired. Those reasons fail when applied to the case at bar. The corporation had the right to enter upon the land for purposes of survey, and to appropriate it on making just compensation. It is, therefore, not necessary to presume that when it built its railroad it intended either to dedicate it to the use of the land or to commit another trespass to the damage of the land ; but it is more reasonable to presume that it intended to retain the railroad for use as such, and lawfully to acquire the land upon which it rested. The railroad was not built to improve the ground, or to enhance its ordinary utility, but to be used as part of an easement for public purposes, entirely independent of the ordinary uses of the ground. To the rule relied upon, exceptions have always been recognized, increasing with the importance and value of personal property, and with the demands and exigencies of society; and as its reasons fail in this case we do not think it should control. All that the constitution guarantees or the law demands is that just compensation shall be made to the owner in return for property appropriated by the public. A rule that would exact of a corporation the payment of a sum to cover the value of a railroad as such, constructed at its own expense, would go beyond the demands of justice, and could find no sort of countenance in conscience or in law outside of the strict letter and fanciful presumptions of the rule stated. The same question has been often adjudicated by the courts of the highest dignity and learning in sister states, and the decided weight of adjudged cases is against the appellant. Aside from adjudication, reason and justice condemn the contention. *Justice v. Railroad Co.*, 87 Penn. St. 28; *Railroad Co. v. Dunlap*, 47 Mich. 456; 11 N. W. Rep'r, 271; *Railroad Co. v. Goodwin*, 111 Ill. 273; *Lewis Em. Dom.*, § 501, and cases cited; *Jones v. Railroad Co.*, 70 Ala. 227; *Searl v. School-District*, 133 U. S. 553; 10 Sup. Ct. Rep'r, 374; *Lyon v. Railway Co.*, 42 Wis. 538. In most of the cases relied upon by the appellant the claim to improvements was presented in such form that, if it were sustained, a separation of the improvements from the land would become necessary, or some

other prejudice result to the land-owner. But neither would result in this case, for the corporation acquires the land, as it lawfully may do, upon the payment of just compensation, and holds the road, built thereon at its own expense, without cost or detriment to the appellant. The injury resulting to the appellant from the unauthorized entry might have been promptly checked and reversed, if need be, by an appeal to the courts. That it was borne so long argues that it did not assume a violent or aggravated form.

The measure of compensation is the value which the land taken would have had at the time of filing the petition if the road had not been constructed on it, together with the difference between the present value of the owner's contiguous land with the road constructed where it is and what would have been its present value if the road had not been built. *Lyon v. Railway Co.*, 42 Wis. 538. And in determining as to the value of the land taken, any appreciation or deterioration that may have resulted to it specially by reason of the building of the road on it will be disregarded, but such as may thereby have resulted to it in common with other lands in the same community will be considered. As the corporation has been in the enjoyment of the land, the damages assessed will bear interest from the date of filing the petition. For the error indicated, the judgment will be reversed, and the cause remanded for further proceedings.*

Eminent domain—time with reference to which damages should be assessed.—Exact justice requires that the payment of just compensation for property taken for public use should be concurrent with the taking. As stated by the supreme court of Massachusetts: "The true rule of justice for the public would be, to pay the compensation with one hand, whilst they apply the ax with the other." *Parks v. Boston*, 15 Pick. 198. When, however, the parties cannot agree and the damages have to be ascertained in the manner prescribed by law, it is manifest that the estimate must be made either before or after the actual taking or appropriation of the property. In view of the rapid changes which the value of property frequently undergoes in this country, it is often an important question to fix the point of time with reference to which the value or damages shall be estimated. Some of the state constitutions expressly provide that the payment of the just compensation must precede the entry upon or appropriation of the property for the public use. In some states the same view has been held by the courts though the constitution did not expressly require it. In other states it is held that the entry upon or appropriation of the property may precede the payment of the

* Reported in 15 S. W. Rep'r, 188, 54 Ark. 140.

compensation. These matters are discussed and the authorities cited and reviewed in Lewis Em. Dom., §§ 454-459.

In those states in which it is held that payment of the compensation need not precede the taking, and where accordingly the *taking* is usually accomplished before the damages are estimated, the time of the taking is usually and properly fixed upon as the date with reference to which the estimate should be made. *Logansport, etc., R. Co. v. Buchanan*, 52 Ind. 163; *Lafayette etc., R. Co. v. Murdock*, 68 Ind. 187; *Graham v. Connersville, etc., R. Co.*, 36 Ind. 463; *Parks v. Boston*, 15 Pick. 198; *Reed v. Hanover Branch R. Co.*, 105 Mass. 303; *Cobb v. Boston*, 109 Mass. 438; *Cobb v. Boston*, 112 Mass. 181; *Pitkin v. Springfield*, 112 Mass. 509; *Hampden Paint Co. v. Springfield, etc., R. Co.*, 124 Mass. 118; *Stafford v. Providence*, 10 R. I. 567. In such cases the *taking* is usually held to be accomplished by the filing of a certain instrument of location or appropriation and the time is fixed by the date of such filing, or, possibly, of entry upon the property. The title would doubtless be held to vest upon the condition of making compensation, and when made, the title would be perfect from the date of the appropriation.

In the states which hold or in which the constitution provides that compensation must be made before the property is taken or entered upon, it is a matter of considerable practical difficulty to say with reference to what time the compensation should be estimated. The date of filing the petition or of commencing proceedings is fixed upon in some states. *Cook v. South Park Comrs.*, 61 Ill. 115; *South Park Comrs. v. Dunlevy*, 91 Ill. 49; *Du Puis v. Chicago & North Wis. Ry. Co.*, 115 Ill. 97; *Chicago, Evanston & Lake Superior R. Co. v. Catholic Bishop of Chicago*, 119 Ill. 525; *Burt v. Merchants' Ins. Co.*, 115 Mass. 1; *Same v. Wigglesworth*, 117 Mass. 302. The last two were suits on the part of an agent of the United States to condemn land in Berlin for a post-office. They are not inconsistent with the cases above cited from the same state, as they were for the purpose of fixing the compensation for property not already taken but to be taken in the future. *Missouri Pacific Ry. Co. v. Hays*, 1 Neb. 224; *Oregon & California R. Co. v. Barlow*, 3 Or. 311 (Circ. Ct.). A law to this effect was held valid in California. *California Southern R. Co. v. Kimball*, 61 Cal. 90; *Tehama County v. Byran*, 68 Cal. 57; *Arcata & Mad River R. Co. v. Murphy*, 71 Cal. 122. See *San Francisco & San Jose R. Co. v. Mahoney*, 29 Cal. 112. The reasons upon which these decisions are based are that the filing of the petition affords a convenient, definite and invariable point of time in every case, to which to refer the question of compensation; that the filing of the petition is a designation of the property and a declaration that it is desired for public use; that the petition is filed upon the basis of values as they then are, and that it would be unjust to one party or the other to estimate the value as of some subsequent time.

The supreme court of Illinois reasons as follows: "But, independent of the statute, the evident object and import of filing a petition, where parties cannot agree, is to ascertain the just and true amount of compensation for the property to be taken, not five years before the petition is filed, or three or five years thereafter, but at the time of filing the petition. Suppose the property in question was worth at the time the petition was filed, \$100,000, and the commissioners, knowing that to be its true value, had provided themselves with money necessary to pay that amount of damages, and filed a petition to

condemn the property, but owing to delays, which are sometimes incident to legal proceedings, over which the commissioners had no control, a trial was not had until three years after the petition was filed, and in the meantime the property had increased in value to \$300,000, would it be reasonable to hold that this increased valuation could be proven, and the commissioners compelled to take the property at double its value when they instituted proceedings to condemn and take? We apprehend that a rule of this character would neither be reasonable nor just, and yet the principle contended for by the commissioners would lead to this result. "In an action for a breach of contract for a failure to deliver goods, the true measure of damages is the value of the goods at the time required by the contract for delivery; and in an action for the conversion of property, the evidence is confined to the value at the time of conversion; and in neither case can proof be introduced of the value of the property after suit commenced, as was aptly illustrated by counsel for the defendants. The same principle may be applied to a case of this character. The filing of the petition is the commencement of the action. Those interested in the land by that act are brought into court, and the inquiry is, what amount shall be then allowed as a just compensation for the property described in the petition?" *South Park Comrs. v. Dunlevy*, 91 Ill. 49, 51, 53.

Similar language is found in the Massachusetts cases. "But the compensation to be paid by the government and received by the owners of the land must be estimated according to the value of the land at the time of the filing of the petition. This affords a definite and invariable rule, which has relation to the time at which the property is designated and set apart for the public use, the owners ascertained who are entitled to be compensated, and the judicial proceedings instituted for the purpose of determining such compensation; and is not liable to be affected by the duration of these proceedings, or by increase or diminution in value, whether occasioned by the taking itself, or by acts of the owners, lapse of time, or other circumstances. In all these respects, it is a juster measure of compensation than the valuation of the estate at any subsequent point of time. And it accords with the rule as settled in this commonwealth in the analogous cases of land taken for highways and railroads." *Burt v. Merchants' Ins. Co.*, 115 Mass. 1, 14.

Other cases fix upon the date of the award of the commissioners as the time with reference to which to estimate the compensation, that is, that the commissioners are to estimate the compensation as of the time of the hearing before them, and in case of any further trial on appeal the date of their award is the date taken for estimating the compensation. *St. Joseph & Denver City R. Co. v. Orr*, 8 Kans. 419; *Winona & St. Peter R. Co. v. Denman*, 10 Minn. 267; *Carli v. Stillwater & St. Paul R. Co.*, 16 Minn. 260; *Warren v. First Division St. Paul & Pacific R. Co.*, 21 Minn. 424; *Knauff v. St. Paul, etc., R. Co.*, 22 Minn. 173; *Conter v. St. Paul & Sioux City R. Co.*, 22 Minn. 342; *Whitacre v. Same*, 24 Minn. 311; *Mont Clair R. Co. v. Benson*, 36 N. J. Law, 557; *Metler v. Easton & Amboy R. Co.*, 37 N. J. Law, 222; *Chesapeake & Ohio Canal Co. v. Tyree*, 7 W. Va. 693; *Milwaukee & Miss. R. Co. v. Eble*, 4 Chand. 72; *Driver v. Western Union R. Co.*, 32 Wis. 569, 579; *Lyon v. Green Bay & Minn. Ry. Co.*, 42 Wis. 538; *West v. Milwaukee, etc., Ry. Co.*, 56 Wis. 318; *Uniacke v. Chicago, Mil. & St. P. Ry. Co.*, 67 Wis. 108; *Reed v. Chicago, Mil. & St. P. Ry. Co.*, 25 Fed. Rep'r, 886. If the compen-

sation is assessed in the first instance by a jury, the time of trial would, by the same rule, be the proper time with reference to which to estimate it. These cases usually proceed upon the ground that as soon as the compensation is assessed the petitioner may pay or deposit it and at once be entitled to the property, and that this fixes the time of the taking. Some courts hold that, if the compensation awarded by the commissioners is not paid or deposited, but an appeal is taken and the case is tried *de novo*, then, as the property has not been taken, the compensation should be assessed as of the time of such trial on appeal. *Galveston, etc., Ry. Co. v. Lyons*, 2 Tex. App. Civil Cases, 133; *Arnold v. Covington & Cincinnati Bridge Co.*, 1 Duvall (Ky.), 373.

It seems to us that the former cases hold the better rule. In addition to the reasons already suggested in favor of the position, may be mentioned the fact that by the commencement of proceedings for the condemnation of property the owner's control over and beneficial use of it, are in many respects abridged. He cannot sell or lease it except subject to the right of the condemning party to take it at the price which may be fixed. His own use of the property is subject to the same condition. Again, somewhere in course of the proceedings to appropriate property, a point of time must be fixed upon when the owner's right to improve the property and to recover for such improvements shall cease. No point of time can be fixed upon for this purpose which is so just to all parties as the date of filing the petition. *Lewis Em. Dom.*, § 663. After the filing of the petition it is no fault of the condemning party that the damages are not assessed, and it ought not to be compelled to pay for improvements which are put upon the property after that date. The condemning party should be allowed to take the property at its then value and in its then condition. To compensate the owner for having his rights over the property abridged, pending the proceedings, he should have interest on the value from the date of filing the petition, less the actual value of the use which he has realized, or might have realized. *Lewis Em. Dom.*, § 499.

Where property was wrongfully entered upon by a railroad company, and years after the owner instituted proceedings for damages which the company converted into condemnation proceedings, it was held the compensation should be estimated as of the time of trial. *County of Blue Earth v. St. Paul & Sioux City R. Co.*, 28 Minn. 503; *Morin v. St. Paul, etc., R. Co.*, 30 Minn. 100. To same effect, *Lyon v. Green Bay & Minn. Ry. Co.*, 42 Wis. 53. A law providing that, where property has been entered upon by a railroad without acquiring title, and proceedings are subsequently instituted, the compensation shall be estimated as of the date of entry, was held valid in Wisconsin. *Kennedy v. Milwaukee & St. Paul Ry. Co.*, 23 Wis. 581; *Aspinwall v. Chicago & N. W. Ry. Co.*, 41 Wis. 474.

In proceedings to obtain damages to property by a dam or by a railroad in a street, it has been held that damages should be assessed as of the date of the injury. *Zimmerman v. Union Canal Co.*, 1 W. & S. 346; *Schuykill Nav. Co. v. Thoburn*, 7 S. & R. 411; *Central Branch U. P. R. Co. v. Andrews*, 26 Kans. 702.

In all cases interest should be allowed from the time with reference to which the compensation is assessed, less the actual value of the use to the owner for so much of that time as he has had possession. *Reed v. Hanover Branch R. Co.*, 105 Mass. 308; *Warren v. First Division of St. Paul & Pacific R.*

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or which makes it imperative upon the court to permit such view in condemna-
t) proceedings upon the application of either party.

APPEAL from appellate court, first district.

Knight & Brown and E. H. Gary for appellant. Jonas Hutchinson, Clarence S. Darrow, Byron Boyden and H. H. Martin for appellee.

CRAIG, J. This was an action to recover damages alleged to have been caused to the property of appellant by the construction of Jackson Street bridge and viaduct, and the approach on Canal street, by the city of Chicago. On a trial the jury returned a verdict in favor of defendant, the city of Chicago. The court overruled a motion for a new trial, and rendered judgment on the verdict. On appeal to the appellate court the judgment was affirmed.

The improvement was completed by the city in July or August, 1888. During the month the improvement was completed

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 as error. In order to determine whether the plain
 been damaged by the construction of the improvement it was
 proper to show the value of the property before and after the
 improvement had been made. Evidence of what the property
 was worth in July and August, 1888, was, therefore, competent
 for the consideration of the jury. This is not, however, disputed
 or denied, but it is claimed that the offer of plaintiff is not evi-
 dence of the value of the property. While we do not think the
 offer of an owner of property to sell at a certain price would be
 conclusive evidence of the value of the property, yet we do think
 that an offer by the owner to sell is competent evidence against
 him as an admission in fixing the value at or near the time the
 offer was made. Lewis Em. Dom., §§ 439, 446; Mills Em.
 Dom. (2d ed.), § 172; 6 Amer. & Eng. Enc. Law, 619, 620;
 Railway Co. v. Ranck, 78 Penn. St. 454; Railroad Co. v. Greely,
 23 N. H. 237; Railroad Co. v. Adolph (Kan.), 21 Pac. Rep'r,
 643; Springfield v. Schmook, 68 Mo. 394; Watson v. Railway
 Co., 57 Wis. 332; 15 N. W. Rep'r, 468; Fogg v. Hill, 21 Me.
 529. In Lewis on Eminent Domain, § 439, the author says: "In
 regard to the proof of admissions of the parties the same general
 rules apply as in other cases. It is competent to prove the dec-
 larations of the owner of the property in question as to its value,
 and the price at which he has offered to sell it, and other admissions
 which are pertinent to the issue." See, also, section 446. In 6 Amer-
 ican and English Encyclopedia of Law, 620, the law on the question
 is stated as follows: "The declarations of the owner as to the value
 of his land, and his offer of it at a fixed price, may competently
 be introduced in evidence against him, and, if the land-owner
 dies while the proceedings are pending, his declarations and ad-

missions are competent evidence against his trustees." The supreme court of Wisconsin, in considering the question in *Watson v. Railroad Co.*, 57 Wis. 332; 15 N. W. Rep'r, 468, said: "This evidence was introduced for the purpose of showing that the land was in fact of greater value after the road was located across it than the value placed upon it by the appellant's witnesses. We think the evidence was competent, not only as tending to prove its real value after the railroad was located across it, but as an admission on the part of the appellants of such value. *Whitman v. Railroad Co.*, 7 Allen, 313, 318; *Shattuck v. Railroad Co.*, 6 Allen, 117." In *Railroad Co. v. Ranck*, 78 Penn. St. 454, the court said: "As evidence bearing on the value of this property, Ranck's own declarations were certainly competent, when offered by the company. His offer of it at a fixed price, and the sale of a portion of it, were facts proper to go to the jury as constituting his estimate of its value. It is true the sale of a portion of the property does not fix with certainty its market value as a whole, but it is an element fair to be considered by the jury." In 1 *Rorer on Railroads*, 379, and in *Pierce on Railroads*, 225, the doctrine is laid down that the admissions of the owner are competent evidence on the question of value. It is, however, said the sale to Yerkes was a forced sale; that Springer, knowing that Yerkes was bound to have the property for a particular purpose, placed a larger price on the property than it was really worth. Whether Yerkes was so situated that he was compelled to purchase this property, and on that account might pay more for it than it was really worth, was a question which no doubt might be considered by the jury in arriving at its value; but at the same time such fact, if it existed, affords no reason why the jury might not also consider the statements and declarations of the plaintiff in connection with the other evidence in arriving at the value of the property. The option placed on the property by the plaintiff, as an admission of the value of the property, was competent evidence for the jury. Whether it proved the value was a question for the jury to determine after a due consideration of all the evidence introduced on the question.

It is next claimed that the court erred in modifying plaintiff's first and third instructions. In the first instruction the jury were directed that if they find from the evidence the defendant had

raised the grade of the street in front of plaintiff's property, and thereby damaged the property, they will find defendant guilty, and assess damages at such sum as they believe from the evidence he sustained, resulting directly from changing the grade in front of said property, taken in connection with the whole improvement. The court added the following: "In case you believe from the evidence that plaintiff's property was damaged by said improvement taken as a whole." The modification was so slight that it did not materially change the meaning of the instruction, but, if it did, the modification was right, and could not mislead the jury. The plaintiff claimed that he was damaged by the improvement, and in passing upon the question it was the duty of the jury to take into consideration the whole improvement. A part of the improvement standing alone may have resulted in damage to plaintiff, but, when the entire improvement is taken into consideration, a benefit, rather than a loss, may have been the result; hence the necessity of the attention of the jury being directed to the whole improvement. What has been said in reference to the first modification will apply to the others.

Complaint is also made of appellee's instructions that they directed the jury that "if, by the improvement as a whole, the property is benefited as much as it is damaged by the construction of the approach alone, then there can be no recovery." The last part of plaintiff's first instruction, prepared by him and given to the jury on the question of the measure of damages, is as follows: "The measure of damages to the property will be the difference, as shown by the evidence, between the fair cash market value of the plaintiff's property without said improvement and change of grade and the fair cash market value of said property with said improvement, taken as a whole and change of grade completed." This was given as asked by plaintiff, except the words "taken as a whole" were added by the court, and it contains the same principle introduced in defendant's instructions, which plaintiff now undertakes to condemn. A party cannot complain of an instruction given in behalf of his adversary like one given at his own request. But, aside from this, we perceive no objection to defendant's instructions. Where an action is brought to recover damages, where no part of the plaintiff's property has been taken, but merely damaged by a

public improvement, the law is well settled that a recovery cannot be had unless the property claimed to be damaged has been depreciated in value by the construction of the public improvement. In other words, if the fair market value of the property is as much immediately after the construction of the improvement as it was before the improvement was made, no damage has been sustained and no recovery can be had. *Elgin v. Eaton*, 83 Ill. 535; *Railroad Co. v. Francis*, 70 Ill. 238; *Railroad Co. v. Hall*, 90 Ill. 42; *Railroad Co. v. Haller*, 82 Ill. 208; *Railroad Co. v. Capps*, 67 Ill. 607, at 614; *Eberhart v. Railroad Co.*, 70 Ill. 347; *Railroad Co. v. Maher*, 91 Ill. 312; *Railroad Co. v. Loeb*, 118 Ill. 203; 8 N. E. Rep'r, 460; *Railroad Co. v. Stein*, 75 Ill. 41, at 47; *Page v. Railroad Co.*, 70 Ill. 324.

After the jury was impaneled, and before the trial commenced, the court, on motion of defendant, permitted the jury, in charge of an officer, to go upon and view the premises in controversy, and this ruling is relied upon as error. It is not claimed that in the conduct of the men there was any misbehavior on the part of the officer in charge, or on behalf of any of the jury or on behalf of either representative of the respective parties who accompanied the jury. The naked claim is a want of power on the part of the court to permit the view. The viaduct was completed in August, 1888, and the trial occurred, and the view was had, in December, 1889. Evidence of the condition of the property at the time of the trial was competent, and the parties had the right to show the value of the property at the time of the trial, as such evidence would have a bearing on the value of the property before and after the alleged damage. The rule seems to be well established that evidence of the value of the property before and after the time when the damages are alleged to have been sustained is admissible, and the time within which such evidence shall be enforced is a matter in the sound discretion of the trial court. *Roberts v. Boston*, 149 Mass. 347; 21 N. E. Rep'r, 668. If the parties had a right to prove by oral testimony the condition of the property at the time of the trial (and upon this point we think there can be no doubt), upon what principle can it be said the court could not allow the jury in person to view the premises, and thus ascertain the condition thereof for themselves. The premises in view may be re-

garded, as it is termed in the books, "real evidence," and oral testimony in reference to the premises could not be as satisfactory in its character as the real evidence. In 1 Best Evidence (Morgan's ed.), section 197, it is said: "Real evidence is either immediate or reported. Immediate real evidence is where the thing which is the source of evidence is present to the senses of the tribunal." In section 198 it is said: "Reported real evidence is where the thing which is the source of the evidence is not present to the senses of the tribunal, but the existence of it is conveyed to them through the medium of witnesses or documents. This sort of proof is, from its very nature, less satisfactory and convincing than immediate real evidence." See, also, Tayl. Ev. (8th ed.), § 554; 1 Whart. Ev. (3d ed.), § 345. It is a common practice in the trial of causes in the circuit court to permit parties to produce things before the jury for their inspection, and that practice has been approved. Thus, in *Iron Works v. Weber*, 129 Ill. 535; 21 N. E. Rep'r, 1078, which was an action to recover for a personal injury, we held that the torn clothing which plaintiff was wearing when injured might properly be shown to the jury. In *Express Co. v. Spellman*, 90 Ill. 455 — an action against a carrier for the loss of a can of yeast — it was held to be proper to allow plaintiff to put in evidence a can similar to the one in which the yeast was shipped for the examination of the jury. In *Jupitz v. People*, 34 Ill. 516, when defendant was on trial for receiving stolen brass couplings, a brass coupling similar to those alleged to have been received was allowed to be submitted to the jury. In other states numerous cases may be found where the same rule of evidence has been adopted. Thus, in an accident case, it is held to be within the discretion of the court to allow the plaintiff to exhibit to the jury his injured limb or body. *Barker v. Town of Perry*, 67 Iowa, 146; 25 N. W. Rep'r, 100; *Railroad Co. v. Wood*, 113 Ind. 548, 549; 14 N. E. Rep'r, 572, and 16 N. E. Rep'r, 197; *Mulhado v. Railroad Co.*, 30 N. Y. 370; *Hatfield v. Railroad Co.*, 33 Minn. 130; 22 N. W. Rep'r, 176. The clothes of the accused were held admissible in *People v. Gonzalez*, 35 N. Y. 49, and *Drake v. State*, 75 Ga. 413; the weapon used by the accused, in *Wynne v. State*, 56 Ga. 113; surgical instruments on a trial under an indictment for illegal operations on a woman, *Com. v. Brown*, 121 Mass. 69; the stick with which a burglar struck the

prosecutor in a trial on charge of burglary, *State v. Mordecai*, 68 N. C. 207; tools used, where a burglary has been committed, *People v. Larned*, 7 N. Y. 445. In *State v. Woodruff*, 67 N. C. 89, it was held in a bastardy case, that the mother of a bastard child might hold it up for the inspection of the jury. It was also held in *Hatfield v. Railroad Co.*, 33 Minn. 130; 22 N. W. Rep'r, 176, on the trial of an accident case, the trial court had the power to require the plaintiff to walk across the court-room in the presence of the jury, in order that the jury might see how he had been affected by the injury. It is there said: "As the object of all judicial investigations is, if possible, to do exact justice, and obtain the truth in its entire fullness, we have no doubt of the power of court, in a proper case, to require the party to perform a physical act before the jury that will illustrate or demonstrate the extent and character of his injuries. This is in accordance with analogous cases in other branches of the law. When a view of real estate will aid the jury in reaching a conclusion, it is within the discretion of the court to permit it. When an inspection of an article of personal property will aid them, it is not infrequent to cause the article to be brought into court for the same purpose. *Line v. Taylor*, 3 Fost. & F. 731; *Lewis v. Hartley*, 7 Car. & P. 405. The practice in patent and in certain equity cases, of allowing tests to be applied before the court, is somewhat analogous in principle. So is the practice of divorce courts, of ordering an examination of the person of the party in certain cases. It is a common practice to allow plaintiffs, in actions for personal injuries, to exhibit to the jury their wounds, in order to show their extent, or to enable a surgeon to demonstrate their nature and character. This has been held proper. *Mulhado v. Railroad Co.*, 30 N. Y. 370. If, for these purposes, a plaintiff may exhibit his injuries, there would seem to be no reason why, under proper circumstances, he may not be required to do the same thing for a like purpose upon request of the defendant." See, also, 1 Whart. Ev. (3d ed.), § 345. In *Nutter v. Ricketts*, 6 Iowa, 92, where there was a controversy in regard to two horses, and the trial court allowed the jury to go in the court-house yard and inspect the horses, the action of the court was sustained. It is there said: "There is no objection in principle, to a jury seeing an object which is the subject of testimony. By this means they

may obtain clearer views, and be able to form a better opinion." See, also, 1 Hale P. C. 635. In *Cozzens v. Higgins*, *42 N. Y. 206, in an action of trespass *quare clausum*, the court of appeals held that it was not error to permit the plaintiff to put in evidence a photographic view of the plaintiff's cellar after the trespass. In *School v. City of Dubuque*, 64 Iowa 736; 17 N. W. Rep'r, 153, a stereoscopic view of property injured by water was held admissible evidence. Other cases might be cited where the same doctrine is laid down, but we have referred to enough to establish the rule that on a trial, in a proper case, things may be exhibited to the jury. And, if evidence of that character may be brought before the jury, upon the same principle we perceive no good reason why a jury may not, under proper regulations established by the court, go upon and view premises which are the subject-matter of the litigation. Had the plaintiff procured a careful survey and plat of the premises, showing the location with reference to streets and alleys, showing the location of all buildings, and showing the improvement made by the city, such a paper would have been competent evidence to go to the jury. Had a photograph or picture of the premises been taken, it would have been competent evidence to go to the jury. If a plat or photograph of the premises would be competent evidence, why not allow the jury to look at the property itself instead of a picture of the same? There may be cases where a trial court should not grant a view of the premises, where it would be expensive, or cause delay, or where a view would serve no useful purpose. But this affords no reason for a ruling that the power to order a view does not exist or should not be exercised in any case. If the appellant desired to control the effect the view might have on the jury in connection with the other evidence introduced, that might have been done by an appropriate instruction; but, as no instruction was asked on that point, he is in no position to complain.

In what cases a view was allowed at common law is a subject upon which the authorities we have examined are not yet very clear. But a view by jury, as we understand the subject, is sanctioned by the common-law practice. In *Stearns on Real Actions*, 102, the author says: "In the ancient practice there were two kinds of view on real actions: (1) View by the party; (2) view by the jury." The author further says: "View by the jury

was allowed in several real actions, as assize of novel disseisin, waste, and assize of nuisance. In these cases, therefore, a view by the party, being rendered unnecessary, was not permitted by the law. 8 Hen. VI, 27; 50 Edw. III, 11. The design of this proceeding was to enable the jury better to understand the matter in controversy between the parties. It was not confined to real actions, but was allowed in several personal actions for an injury to the realty, as trespass *quare clausum fregit*, trespass on the case, and nuisance." In Burrows' note in 1 Burrows, 253, the practice in regard to jury views, as settled upon by the king's bench, is stated by the reporter: "Before the 4 and 5 Anne, chapter 16, section 8, there could be no view till after the cause had been brought on to trial. If the court saw the question involved in obscurity, which might be cleared up by a view the cause was put off, that the jurors might have a view before it came on to be tried again. The rule for a view proceeded upon the previous opinion of the court or judge, at the trial, 'that the nature of the question made a view not only proper, but necessary;' for the judges at the assizes were not to give way to the delay and expense of a view, unless they saw that the cause could not be understood without them. However, it often happened in fact that upon the desire of either party causes were put off for want of a view, upon specious allegations from the nature of the question that 'a view was proper,' without going into the proof, so as to be able to judge whether the evidence might not be understood without it. This circuitry occasioned delay and expense, to prevent which the 4 and 5 Anne, chapter 16, section 8, empowered the courts at Westminster to grant a view in the first instance previous to the trial. As a view might be of use, and in this shape was attended with no delay and with but little expense, it became the practice to grant them of course upon the motion of either party." In 2 Tidd on Practice, 795, in speaking on the subject, the author says: "In actions of waste, trespass *quare clausum*, and other actions where it appears to the court in vacation to be proper and necessary that the jurors * * * who are to try the issue should for the better understanding of the evidence have a view of the * * * lands or place in question, the court or judge will grant a rule for such view, pursuant to the statute 4 Anne and 6 George IV, chapter 50,

section 23. * * * Before the making of the above statute, there could have been no view till after the cause had been brought on to trial, when, if the court saw the question involved in any obscurity which might be cleared up by a view, the cause was put off, that the jurors might have a view before it came on again." See, also, Sell. Pr. 449. If at common law, independent of any English statute, the court had the power to order a view by jury, as we think it plain the court had such power, as we have adopted the common law in this state our courts have the same power.

It is argued by the counsel, because the legislature has provided for a view in condemnation cases, that it should be held that a view was unauthorized in all other cases. We do not regard this position well taken. The eminent domain act does not merely permit the court in a condemnation proceeding to allow the jury to view the premises, but the statute absolutely requires the court to do so on the application of either party. The statute is imperative. It declares said jury shall at the request of either party, go upon the land. Rev. St., chap. 47, § 9. The fact, therefore, that the statute makes it obligatory on the court to permit the jury on the application of either party to view the premises on the trial of a case under the eminent domain act, has no bearing whatever on the question whether the court has the power in the exercise of this discretion to order a view. Here it is apparent that the jury could obtain a much better understanding of the issue presented by the pleadings by a view of the premises, and, in the exercise of a sound legal discretion, we think the court did not err in allowing the view. The judgment of the appellate court will be affirmed.*

Eminent domain—view of the premises.—The effect to be given a view of the premises by the jury is considered in *Baltimore & Ohio R. Co. v. Flower*, 1 Am. R. R. & Corp. Rep. 706, and note.

Offers to buy or sell as evidence of value.—In *Muller v. Southern Pac. R. Co.*, 2 Am. R. R. & Corp. Rep. 40, it is held that *bona fide* offers made for property may be given in evidence to prove value. The authorities as to the competency of proving offers for the purchase of property made to the owner and offers to sell made by him, are considered in the note in the same case.

* Reported in 26 N. E. Rep'r, 514.

PEARSALL V. WESTERN UNION TEL. CO.

(Court of Appeals of New York, Second Division, Jan. 23, 1891.)

1. TELEGRAPH COMPANY. MISTAKE IN MESSAGE. PRIMA FACIE CASE. In an action for the erroneous transmission of a telegraphic message, proof by the plaintiff of the contract, implied by the delivery of the message to be transmitted, and its acceptance by the defendant's agent, and of the breach, makes out a *prima facie* case, and plaintiff need not go further and show any negligent act or omission by defendant.

2. LIMITING LIABILITY. EFFECT OF USE OF BLANKS. NOTICE. Defendant showed that for a long time it had used a blank upon which messages were usually written, which contained a printed stipulation limiting its liability for mistakes. Plaintiff admitted that he was familiar with the appearance of the blanks; had frequently written messages on them; that a parcel of them was always lying on the table in his office, but that he had never read the stipulation and had no knowledge of its terms. Held, that in the absence of a showing that the terms of the stipulation were brought home to the plaintiff, it was not error to exclude the blank from the consideration of the jury.

3. STOCKHOLDER IN TELEGRAPH COMPANY NOT AFFECTED BY RESOLUTION OF DIRECTORS LIMITING LIABILITY. The fact that plaintiff was a shareholder in defendant company does not charge him with notice of a resolution of the board of directors that it would not thereafter be liable for mistakes in unrepeated messages, and it was not error to exclude such resolution when offered in evidence.

4. ORDER TO PURCHASE STOCK. MEASURE OF DAMAGES. The proper measure of damages for failure to deliver a telegraphic message containing on its face an instruction to buy a certain stock, that in consequence was not bought until twenty-four hours later, is the difference between the market value of the stock when the message ought to have been delivered and on the day after.

A PPEAL from a judgment of the general term of the supreme court of the first judicial department, which affirmed a judgment entered on a verdict in favor of the plaintiff for \$1,757.86 damages. In July, 1884, the plaintiff was a member of the firm of T. W. Pearsall & Co., bankers and brokers, engaged in business at the Mills Building, No. 17 Broad street, in the city of New York. At about eight o'clock in the forenoon of July 31, 1884, the plaintiff wrote on a sheet of blank paper, and delivered to the telegraph operator at the station of the Long Island Railroad at Great Neck, the following telegram: "Great Neck, L. I., July 31st. T. W. Pearsall & Co., Mills Building, New York city: Buy one thousand Western Union Telegraph. T. W.

Pearsall." The message was not prepaid, but it was delivered at the office of T. W. Pearsall & Co., before ten o'clock in the forenoon of the same day, where the charge of twenty-five cents for its transmission was paid. The operator who received the message and transmitted it from Great Neck addressed it to "T. W. Pearsall, Mills Building, New York city," and it was so received by the receiving operator in New York, so written out on defendant's blank form No. 1, sealed in an envelope, and addressed, "T. W. Pearsall, Mills Building, New York city." The following is a copy of the message as transmitted from Great Neck and as delivered:

"Form No. 1. The Western Union Telegraph Company. This company transmits and delivers messages only on conditions limiting its liability, which have been assented to by the sender of the following message. Errors can be guarded against only by repeating a message back to the sending station for comparison, and the company will not hold itself liable for errors or delays in transmission or delivery of unrepeatd messages beyond the amount of tolls paid thereon, nor in any case where the claim is not presented in writing within sixty days after sending the message. This is an unrepeatd message, and is delivered by request of the sender under the conditions named above.

"THOMAS T. ECKERT, *Manager*.

"NORVIN GREEN, *President*.

6		8.47		8.34
Number	Sent by	Rec'd by	7 Collect	Check
1	Jm	Fg		Delivered from 16 Broad street.

"Received at the Western Union Building, 195 Broadway, New York, July 31, 1884. Dated Great Neck Depot, L. I., 31. To T. W. Pearsall, Mills building, N. Y.: Buy one thousand Western Union Telegraph. T. W. Pearsall."

No person connected with the office of T. W. Pearsall & Co., had authority to open telegrams addressed to the plaintiff individually, and this one remained unopened until about ten o'clock A. M. of August 1, when the plaintiff reached his office, opened and read the message. The result was that the shares ordered

were not purchased July 31, and on the morning of August 1, they had risen in the market, so that they sold for \$1,700 more than they did on the morning of the day before, and the plaintiff then actually purchased that number of shares, and paid the market rate. This action was brought to recover the sum of \$1,700. The defendant, by its amended answer (subdivision 5), admits that the message was delivered at its office at Great Neck, L. I., to a son of its agent, and by the letter of its general manager admits that the error in its transmission was that of the operator at Great Neck, but it alleges that at this time, and for a long time previously, the defendant was using a blank upon which messages were usually written, which contained the following printed matter: "Form No. 2. The Western Union Telegraph Company. All messages taken by this company are subject to the following terms: To guard against mistakes or delays the sender of a message should order it repeated; that is, telegraphed back to the originating office for comparison. For this one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any unrepeatable message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any repeated message beyond fifty times the sum received for sending the same, unless specially insured; nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages. And this company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination. Correctness in the transmission of messages to any point on the lines of this company can be insured by contract in writing, stating agreed amount of risk, and payment of premium thereon at the following rates, in addition to the usual charge for repeated messages, viz., one per cent for any distance not exceeding one thousand miles, and two per cent for any greater distance. No employe of the company is authorized to vary the foregoing. No responsibility regarding messages attaches to this company until

the same are presented and accepted at one of its transmitting offices; and, if a message is sent to such office by one of the company's messengers, he acts for that purpose as the agent of the sender. Messages will be delivered free within the established free delivery limits of the terminal office; for delivery at a greater distance a special charge will be made to cover the cost of such delivery. The company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message. Thos. T. Eckert, general manager. Norvin Green, president." That plaintiff had notice of those terms and conditions. Upon the trial, the plaintiff testified: "I am familiar with the general appearance of the blanks, with the printed heading, which the Western Union Telegraph Company furnishes to persons whose business it desires; and have been so for a good many years. I have frequently sent messages written on such blanks. Bundles of such papers are lying on the table in my office, ready of access to any one who desires to send a message by telegraph. There is quite a parcel of them there, always in full view. I have been in the habit of taking blanks from that pile, and writing messages on them, and sending them myself; and I had been, previous to the time this message was written, on the 31st of July, 1884. * * * Question. Did you ever, in point of fact, before sending this message, read any of this printed matter that is at the head of the blanks in your office? Answer. No, sir. Q. Had you in any way knowledge of the terms of those conditions? A. No, sir." On the trial the defendant offered in evidence blank form No. 2, and insisted that the plaintiff was bound by its terms; but the court rejected the offer, and ruled that the terms were not binding on the plaintiff. But two questions were submitted to the jury: (1) Whether the defendant was negligent in transmitting the message; (2) the amount of damages. The jury returned a verdict for \$1,757.86, upon which a judgment was rendered, which was affirmed by the general term, from which the defendant appeals to this court.

Burton N. Harrison for appellant. *Thomas G. Shearman* for respondent.

FOLLETT, C. J. (after stating the facts as above). This action
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was tried and a recovery had at circuit, which was sustained at the general term, on the theory that the contract between the parties was the one implied by law when a telegraph company receives, without conditions, a message for transmission. Among other obligations implied in such a case is the duty to accurately transmit and deliver to the addressee the message received, which, in this case, the defendant failed to do, as it admits, by reason of the mistake of the operator who received and undertook to send forward the communication. Under such a contract a telegraph company does not insure the accurate transmission and delivery of a dispatch, but undertakes to exercise due diligence to do so. The question has several times arisen whether, in actions for damages against such corporation for failing to accurately or promptly deliver communications, a plaintiff makes out a *prima facie* case by proving the contract and its breach, or whether the plaintiff must go further, and give evidence of some negligent act of omission or commission on the part of the corporation or of its agents. *Rittenhouse v. Independent Line of Tel.*, 1 Daly, 474; 44 N. Y. 263, was brought to recover damages for failing to correctly transmit a message, and it was held that a *prima facie* case was made out by showing that the communication delivered was not a copy of the one sent. In *Baldwin v. Telegraph Co.*, 45 N. Y. 544, a dispatch was received for "Erie Darling," but, as transmitted, it was addressed to "E. R. Cooley," and was not delivered to Darling for several days; and it was held that by proof of these facts a *prima facie* case was established. In *Breese v. Telegraph Co.*, 48 N. Y. 132, it was proved that a message to purchase \$700 in gold was changed to one to buy \$7,000 in gold; and it was said, though not necessary for the decision of the case, that it was not *prima facie* proof of negligence. The rule laid down in the first two cases has been followed by the courts of other states, and is approved by the text-writers. Whart. Neg., § 756; Gray Tel., §§ 26, 53, 54, 77; Abb. Tr. Ev., chap. 32; 2 Greenl. Ev., § 222a, note; 2 Shear. & R. Neg., § 542; 2 Thomp. Neg. 837; 3 Suth. Dam. 295. The court correctly instructed the jury that the evidence made out a *prima facie* case of negligence against the defendant. In the cases holding that telegraph companies are only liable when grossly negligent there were contracts exempting them from all liability except to refund the tolls received, for negligently sending

or delivering the communication. Without considering whether there is any legal distinction to be drawn between gross and ordinary negligence in such cases, it is sufficient to say that these cases are not germane to the question in the case at bar.

At the time this message was received the plaintiff was one of defendant's shareholders, and it was offered to be proved in defense of the action that the board of directors had adopted a resolution that it would not be liable for mistakes or delays in the transmission or delivery of unrepeatd messages, and would not be liable for damages arising from delays in the transmission or delivery of a repeated message beyond an amount specified; and it was insisted that a shareholder was chargeable with notice of this resolution. The regulations were excluded, and the defendant excepted. In this there was no error, for a shareholder in a corporation is not chargeable with constructive notice of resolutions adopted by the board of directors, or by provisions in the by-laws regulating the mode in which its business shall be transacted with its customers, and the plaintiff's rights, arising out of defendant's contract to transmit the message, were in no wise limited by its regulations or by-laws not brought to the plaintiff's knowledge. *Hill v. Water-Works Co.*, 5 Barn. & Adol. 866; *Rice v. Peninsular Club*, 52 Mich. 87; 17 N. W. Rep'r; 708; 1 Mor. Priv. Corp., §§ 500, 500a.

The court instructed the jury that the plaintiff was entitled to recover the difference between the market value of the stock on the morning of July 31 and the sum which he paid for it on the morning of the following day. It distinctly appeared on the face of the dispatch that it was an order to buy shares; and in such cases, the liability of the corporation not being limited by a special contract, the measure of damages is the difference between the market value of the shares at the time when the dispatch should have been delivered and the sum paid for them in the market on the receipt of the message. *Rittenhouse v. Independent Line of Tel.*, 44 N. Y. 263; *Leonard v. Telegraph Co.*, 41 N. Y. 544; *Squire v. Telegraph Co.*, 98 Mass. 232; *Telegraph Co. v. Hall*, 124 U. S. 444; 8 Sup. Ct. Rep'r, 577; *Telegraph Co. v. Wenger*, 55 Penn. St. 262; 3 Suth. Dam. 307. It is insisted in behalf of the defendant that the court erred in excluding from the consideration of the jury the conditions printed on

form 2. It is settled that a telegraph company incorporated under the general statutes of this state may, by contract, limit its liability for mistakes or delays in the transmission or delivery, or for the non-delivery of messages, caused by the negligence of its servants, if the negligence be not gross, to the amount received for sending the dispatch. *Breese v. Telegraph Co.*, 48 N. Y. 132; *Kiley v. Telegraph Co.*, 109 N. Y. 236; 16 N. E. Rep'r, 75. But it has never been decided by the court of last resort that such a company can, by notice, limit its liability for such mistakes or delays. *Breese v. Telegraph Co.*; 45 Barb. 274; 48 N. Y. 132, arose out of an erroneous transmission of a message written on a blank containing printed conditions, and it was held that a party by writing his dispatch on the blank assented to the printed terms and conditions. In discussing the question, it was said: "They [telegraph companies] can thus limit their liability for mistakes not occasioned by gross negligence or willful misconduct, and this they can do by notice brought home to the sender of the message, or by special contract entered into with him." We think this remark cannot be regarded as an adjudication that the common-law liability of a telegraph company may be limited by a mere notice unless it is brought to the personal knowledge of the sender of the message, and he is shown to have assented to it. In this state a common carrier may, by an express contract with the shipper, exempt itself from liability for loss or damage occasioned by the negligence of its servants. *Wells v. Railroad Co.*, 24 N. Y. 181; *Bissel v. Railroad Co.*, 25 N. Y. 442; *Poucher v. Railroad Co.*, 49 N. Y. 263; *Cragin v. Railroad Co.*, 51 N. Y. 61; *Spinetti v. Steamship Co.*, 80 N. Y. 71; *Mynard v. Railroad Co.*, 71 N. Y. 180; *Wheel. Carr.* 76, 86. But a common carrier cannot, by notice, limit its common-law liability to safely carry and deliver goods without evidence of the shipper's assent to the limitation proposed. *Hollister v. Nowlen*, 19 Wend. 234; *Cole v. Goodwin*, 19 Wend. 251; *Clark v. Faxton*, 21 Wend. 153; *Transportation Co. v. Belknap*, 21 Wend. 354; *Dorr v. Navigation Co.*, 11 N. Y. 485; *Blossom v. Dodd*, 43 N. Y. 264. Telegraph companies organized, like the defendant, under chapter 265 of the Laws of 1848 and the acts amendatory thereof and supplementary thereto, like companies incorporated for the carriage of goods and passengers, owe duties to the public. Such corporations, like

railroads, may exercise the right of eminent domain, and they are required to exercise due diligence to transmit with celerity and skill all messages delivered to them, subject to such reasonable rules as may be adopted to protect their rights and facilitate the performance of their duties. They, like common carriers, have become necessary instrumentalities for conducting the business of the country, and they owe the same duty to the public, and, we think, should be held to the same rule in respect to their right to limit their liability by notice. In this state the doctrine that the common-law liability could not be limited without an express contract has been applied to individuals and firms acting as common carriers, as well as to corporations. In *MacAndrew v. Telegraph Co.*, 17 C. B. 3, it was said that the common-law liability of a telegraph company may be limited by notice; but the report of the case does not show whether the message was written on a blank with or without conditions. But in England it was held that carriers could by notice limit their liability for the loss of goods even in cases of gross negligence, which resulted in statutes providing that their liability could not be limited except by an express contract. Section 6, chap. 68, 11 Geo. IV, and 1 Wm. IV; § 7, chap. 31, 17 and 18 Vict. In *Clement v. Telegraph Co.*, 137 Mass. 463, a message, not written upon one of the defendant's blanks, was sent to its office for transmission. It was forwarded in due time, but was not delivered by the office at which it was received. In an action brought for the recovery of damages occasioned by the failure to deliver, it appeared that the plaintiff's agent who sent the message knew the terms and conditions on which the defendant, by its rules, provided that messages should be sent over its line, as set forth in the blank then in use by it; and it was held that this knowledge of the plaintiff's agent was binding upon him, and that no recovery could be had. In the case last cited a different rule was applied to telegraph companies from the one applied by the same court to express companies. In *Gott v. Dinsmore*, 111 Mass. 45, the plaintiff shipped goods by express, not taking at the time the usual receipt containing printed conditions limiting the liability of the company, with which the plaintiff was familiar, he having been in its employment, and issued many such receipts. It was held that mere notice brought home to the owner of the goods, by which the

carrier seeks to limit its common-law liability, and the terms of which are not expressly assented to, were insufficient to defeat a claim for loss. The court said: "Nor does the knowledge of the regulation, which the plaintiff had previously acquired while in defendant's employment, subject him to the limitations imposed by the receipt." In *Ellis v. Telegraph Co.*, 13 Allen, 226, the reasons are clearly and satisfactorily stated for the existence of the rule that telegraph companies are not, unless they so expressly contract, held to warrant or insure the accurate transmission or prompt delivery of messages, and are only liable for negligence. But we find no satisfactory reason in this, or in any case, for a rule that such companies may by notice limit their liability for negligence; nor do we see any in the nature of the business in which they are engaged. Carriers and telegraph companies are alike engaged in *quasi* public employments, and persons are from necessity compelled to employ the latter, without more opportunity for choice and deliberation than when they select the former. As before shown, the liability on contract of carriers of goods, which is implied by law, cannot be limited by notice; and it is difficult to see why telegraph companies should be permitted to limit a much less onerous obligation by a mere notice. The judgments should be affirmed with costs. All concur, except Bradley and Brown, JJ., dissenting, and Haight, J., not sitting.

BRADLEY and BROWN, JJ. (dissenting). After the blank known as "Form No. 2" was put in evidence the defendant's counsel was not permitted to read to the jury the rules and regulations printed upon said blank, and which stated the conditions upon which all messages were taken by the company. In substance these regulations were to the effect that the company would not be liable for mistakes in the delivery of a message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same, unless the sender should order the message telegraphed back to the originating office for comparison; and for that service one-half the regular rate was to be charged in addition to the amount received for sending the message. The defendant testified that he had no knowledge of the terms of the conditions upon the form No. 2; but there was ample evidence in the case from which the jury could have found

that the plaintiff knew of these regulations, and that all messages received by the company were sent over its wires subject thereto. If the jury had so found, it would have been permissible for them to find that the message in question was sent subject to such conditions, and that the defendant's liability was limited to the amount charged for sending the message. A special and express contract is not necessary to limit the liability of a telegraph company for mistakes in transmission of messages, and in this respect such corporations differ from common carriers. The reasons for this distinction are very clearly pointed out in *Ellis v. Telegraph Co.*, 13 Allen, 226, and in the views there expressed we concur. In that case a message was written upon one of the blanks of the corporation, upon which was printed the rules of the company limiting its liability. In *Clement v. Telegraph Co.*, 137 Mass. 463, the message was not written upon one of the defendant's blanks, but on its delivery to the defendant it was upon a plain piece of paper. The condition upon which defendant, by its rules, provided that messages should be sent over its line as set forth in the form or blank in use by it were, however, known to the plaintiff's agent, such blanks having been frequently used by him; and it was accordingly held that a finding was warranted that the contract was entered into subject to the stipulations contained upon such blanks, and that the plaintiff could recover only the cost of the message. We can see no conflict between this case and *Gott v. Dinsmore*, 111 Mass. 45, cited in the prevailing opinion, the latter being an action against an express company for the loss of a trunk, and was disposed of by the application of rules of law applicable to common carriers. In this state it has been decided that a telegraph company is not a common carrier, and it is not subject to the peculiar liability of common carriers. *Breese v. Telegraph Co.*, 48 N. Y. 132; *Schwartz v. Telegraph Co.*, 18 Hun, 158; *Kiley v. Telegraph Co.*, 109 N. Y. 231; 16 N. E. Rep'r, 75. In the case last cited, in speaking of the regulations limiting the liability of the company unless the message was repeated, it was said: "That a telegraph company has the right to exact such a stipulation from its customers is the settled law in this and most of the states of the Union and in England. The authorities hold that telegraph companies are not under the obligation of common carriers. They

have the right to make reasonable regulations for the transaction of their business, and to protect themselves from liabilities which they would otherwise incur through the carelessness of their numerous agents, and the mistakes and defaults incident to the transaction of their peculiar business. The stipulation printed in the blank in use in this case has frequently been under consideration in the courts, and has always in this state, and generally elsewhere, been upheld as reasonable." In that case the message was written upon one of the printed forms of the defendant, and it was decided that the plaintiff would be held, by the use of the blank and its delivery to the company, to have assented to the condition thereon, although he might not have known their precise terms; and the Massachusetts case referred to, and the Brees Case and Schwartz Case, were cited as authorities for such decision. The authorities cited establish, in our opinion, the rule that a telegraph company may limit its liability for mistakes in the transmission of messages by reasonable regulations brought to the knowledge of its customers; and had the jury found, as they might have done upon the evidence in this case, that the plaintiff knew that such regulations had been established, and that the defendant's liability was limited to the amount charged for sending the message, unless it was ordered to be telegraphed back, it would also have been permissible for them to find that he contracted with the defendant upon such condition. Whether the court would have been justified upon a finding of knowledge of these conditions upon plaintiff's part, in holding as a matter of law that he must be deemed to have assented to the condition, it is unnecessary to here state, in view of the fact that the judgment is to be affirmed. The views now expressed sufficiently indicate the difference existing between the majority and minority of the court. It was material to a proper disposition of the case that the regulations printed upon the blank put in evidence should have been read to the jury, and it was error for the court to exclude them, and for such error the judgment should be reversed, and a new trial granted.*

1. Telegraph companies — liability for negligence — *prima facie* case. — Failure of a telegraph company to transmit and deliver a message in the form and language in which it was received is *prima facie* evidence of

* Reported in 26 N. E. Rep'r, 534; 124 N. Y. 256.

negligence. *Western Union Tel. Co. v. Short*, 8 Am. R. R. & Corp. Rep. 564.

2. **Limiting Liability.**—As to validity of stipulation limiting the liability of the company as to unrepeatd messages, see *Western Union Tel. Co. v. Short*, 8 Am. R. R. & Corp. Rep. 564. In *Hill v. Western Union Tel. Co.*, 8 Am. R. R. & Corp. Rep. 400, the sender who writes his message upon one of the company's blanks, is held to assent to the terms and conditions contained therein, in so far as the same are reasonable.

CITY OF CHICAGO V. TROTTER.

(Supreme Court of Illinois, Jan. 22, 1901.)

1. **MUNICIPAL CORPORATIONS. ORDINANCES. STREET PROCESSIONS.** Under the general power to regulate the use of the streets and to regulate the police of the city, a city is not authorized to pass an ordinance prohibiting parades or processions in the streets until a permit therefor has been obtained from the superintendent of police.

2. **ORDINANCE UNREASONABLE.** Such an ordinance is unreasonable as vesting in a single man the arbitrary discretion of granting permits to whom he pleases, or of denying them altogether.

3. **DELEGATION OF POWER BY COUNCIL.** Such ordinance is also invalid as delegating to the superintendent of police the power and discretion vested in the council by statute.

ERROR to appellate court, first district. Action brought by the city of Chicago against John Trotter, a member of the Salvation army, for marching in a procession through the streets of the city without a permit. Defendant was found guilty, but the judgment was reversed by the appellate court. The city brings error.

John A. May and *W. J. Bulger* for plaintiff in error. *McMurdy & Job* and *Griggs & Allen* for defendant in error.

BAKER, J. The city of Chicago is organized under the general act for the incorporation of cities and villages. Rev. St., chap. 24. Among the powers given to the city council by the various clauses of section 1 of article 5 of the act, are these: To regulate the use of the public streets, to regulate and prohibit the exhibition or carrying of banners, placards, advertisements or hand-bills in the streets or public grounds, or upon the sidewalks; to prevent and suppress riots, routs, affrays, noises, disturbances and disor-

derly assemblies in any public or private place; to declare what should be a nuisance, and to abate the same, and to impose fines upon parties who may create, continue or suffer nuisances to exist; to prevent and regulate the rolling of hoops, playing of ball, flying of kites or any other amusement or practice having a tendency to annoy persons passing in the streets or on the sidewalks, or to frighten teams or horses; to regulate the police of the city, and pass and enforce all necessary police ordinances. Section 1 of an ordinance of the city, passed July 23, 1886, is as follows: "Section 1. That no parades or processions shall be allowed upon the streets of the city, nor shall any open-air meeting be held upon any ground abutting upon any street or avenue of the city, until a permit therefor shall first be obtained from the police department, under penalty of not less than twenty-five dollars, nor more than one hundred dollars. Such permits shall be issued, without fee, by the superintendent of police, and shall, in the case of parades and processions, specify the route to be followed upon the streets of the city."

This suit is a prosecution by the city against John Trotter, the appellee, for a violation of said section of said ordinance. The question at issue is the validity or invalidity of the ordinance. It is to be noted that the several charter powers above enumerated, and which, it is insisted, authorize and sustain the enactment under consideration, are powers that are conferred upon, and are to be exercised by, the city council. Parades and processions upon the streets of a city are not necessarily productive of danger and disorder so as to render them *per se* the creators of public disturbances; nor are they necessarily nuisances. There is no authority, therefore, in the municipal corporation to suppress such demonstrations of all kinds, at all times, and under all circumstances. Citizens have the constitutional right "of pursuing their own happiness;" and on suitable occasions, and for lawful purposes, and in a peaceable manner they may gather together in street parades and processions, if they so desire, provided they do not disturb or threaten the public peace, or substantially interfere with the rights of others.

The ordinance in question seems to recognize the fact that all processions are not to be repressed, and seems to proceed upon the theory that some of such demonstrations are to be allowed

and permitted, and others prevented. It does not, however, fix and determine the conditions under which parades and processions will be unlawful. It merely leaves it to the discretion or caprice of the superintendent of police to imperatively prescribe who shall be permitted to gather together in such processions, and who shall not; to dictate that the members of one political party, or of one religious denomination, or of one civic society may, and the members of another political party, religious denomination or civic society may not, have such parades or processions; and to arbitrarily fix the times, occasions and localities when and where such assemblages will be allowed. Under the ordinance the superintendent of police has even authority to prohibit all street parades and processions whatever. It is subversive of the liberty of the citizen, and outside of the domain of the law, that authority so arbitrary should be lodged in one individual. The powers that were granted by the state, and that are relied upon by the municipality, were delegated to the city council; and that body could not transfer its legislative prerogatives, and the public trust which was imposed upon it, to a mere executive officer. All ordinances must be reasonable, and the ordinance before us is unreasonable. As was said by the supreme court of Michigan in *Re Frazee*, 63 Mich. 399; 30 N. W. Rep'r, 72, where a similar ordinance was under investigation: "This by-law is unreasonable, because it suppresses what is in general perfectly lawful, and because it leaves the power of permitting or restraining processions, and their courses, to an unregulated official discretion, when the whole matter, if regulated at all, must be by permanent, legal provisions, operating generally and impartially." In our opinion the ordinance of July 23, 1886, is invalid, and appellee could not lawfully be convicted for a violation of its provisions. The judgment of the appellate court is affirmed.*

Municipal corporations — regulating street processions — police power.— In the *Matter of Frazee*, 63 Mich. 396, *Frazee* was convicted of violating an ordinance of the city of Grand Rapids, section 1 of which was as follows: "No persons or person, association or organizations, shall march, parade, ride or drive in or upon or through the public streets of the city of Grand Rapids, with musical instruments, banners, flags, torches, flambeaux, or while singing or shouting, without having first obtained the consent of the mayor or common council of said city; funeral and military processions, how-

* Reported in 26 N. E. Rep'r, 359.

ever, shall not be subject to the foregoing provisions of this section; but such processions as well as those having the permit or consent of the mayor or common council, when using the public streets of said city, shall conform to such directions as the mayor or the chief of police may give in relation to the streets to be used, and the portion thereof to be occupied by them, and in relation to the manner of such use."

The penalty fixed for a violation of the ordinance was a fine not exceeding \$500 and imprisonment until payment, not exceeding ninety days. Frazee having been convicted and imprisoned under the ordinance, petitioned for a writ of *habeas corpus* to test the validity of the ordinance and, hence, the legality of his imprisonment. Frazee was a member of the "Salvation army" and was arrested, with others, for parading the streets of the city with musical instruments, banners, etc., without the consent of the mayor or common council. The court held the ordinance invalid and discharged the petitioner.

The charter powers of the city under which the right to pass the ordinance was claimed were as follows :

1. "To prevent vice and immorality ; to preserve public peace and good order ; to prevent and quell riots, disturbances and disorderly assemblages."
2. "To prevent the cumbering of streets, sidewalks, etc., in any manner whatever."
3. "To control, prescribe and regulate the manner in which the highways, streets, avenues, lanes, alleys, public grounds and spaces within said city shall be used."
4. "To prohibit practices, amusements and doings in said streets having a tendency to frighten teams and horses, or dangerous to life and property."
5. "To prohibit and prevent any riot, rout, disorderly noise, disturbance or assemblage in the streets or elsewhere in said city."
6. "To provide for maintaining the peace and good government of said city."

It was held that these general grants of power must be construed "in conformity to constitutional principles and in harmony with the general laws of the land," and "as only conferring such power over the subjects referred to as will enable the city to keep order, and suppress mischief, in accordance with the limitations and conditions required by the rights of the people themselves, as secured by the principles of law, which cannot be less careful of private rights under a constitution than under the common law." The ordinance was held unreasonable and, therefore, invalid, "because it suppresses what is in general perfectly lawful, and because it leaves the power permitting or restraining processions, and their courses, to an unregulated official discretion, where the whole matter, if regulated at all, must be by permanent, legal provisions, operating generally and impartially."

Upon the reasonableness of the ordinance the court says : "It has been customary from time immemorial, in all free countries, and in most civilized countries, for people who are assembled for common purposes to parade together, by day or reasonable hours at night, with banners and other paraphernalia, and with music of various kinds. These processions for political, religious and social demonstrations are resorted to for the express purpose of keeping up unity of feeling and enthusiasm, and frequently to produce some effect on the public mind by the spectacle of union and num-

bers. They are a natural product and exponent of common aims, and valuable factors in furthering them. They are only found to any appreciable extent in places having collected inhabitants, for spectators are generally as important as members. They are among the incidental conditions of city life, and are as much to be expected, on suitable occasions as any other public meetings, and not necessarily any more dangerous.

"They are, however, capable of perversion to bad uses, and, when so perverted, may be dangerous. When people assemble in riotous mobs, and move for purposes opposed to private or public security, they become unlawful, and their members and abettors become punishable. These dangers are as well known as the customs themselves are and are sometimes very great dangers. There may be times and occasions when such assemblies may for awhile be dangerous in themselves, because of inflammable conditions among the population. All of these things are as ancient as the law, and are generally within reach of the law, unless the law itself is, for the time, suspended by military necessity. During all this period of public history, cities have existed, and had powers of local administration. But it has never been supposed that they needed or ought to possess any repressive power over these movements which was not subservient and subsidiary to the general legal scheme of government."

"It is only when political, religious, social or other demonstrations create public disturbances, or operate as nuisances, or create or manifestly threaten some tangible public or private mischief that the law interferes. And when it interferes it does so because of the evil done, or apparently menaced, and not because of the sentiments or purposes of the movement, if not otherwise unlawful; and things absolutely unlawful are not made so by local authority but by general law. All may be capable of legal mischief by perversion, or by circumstances. It is lawful to provide for dealing with the mischief, but it is not lawful to go beyond reasonable measures and precautions in anticipating it. Private liberty, and public tranquillity and security, must both be kept in view.

"We cannot accede to the suggestion that religious liberty includes the right to introduce and carry out every scheme or purpose which persons see fit to claim as part of their religious system. There is no legal authority to constrain belief, but no one can lawfully stretch his own liberty of action so as to interfere with that of his neighbors or violate peace and good order. The whole criminal law might be practically superseded if, under pretext of liberty of conscience, the commission of crime is made religious dogma. It is a fundamental condition of all liberty, and necessary to civil society, that all men must exercise their rights in harmony and must yield to such restrictions as are necessary to produce that result. It is not competent to make any exceptions either for or against the body of which petitioner is a member, because of its theories concerning practical work. In law it has the same right, and is subject to the same restrictions, in its public demonstrations as any secular body or society which uses similar means for drawing attention or creating interest.

"Whatever regulation is made must operate uniformly, under the same conditions. It is competent to hold all persons liable for any actual wrong done which creates dangerous or noxious consequences. That is already pro-

vided for under the laws of nuisances. These processions might no doubt become nuisances, as any others might do so, but it cannot be assumed that they will; and it appears in the record before us that they have been judicially adjudged otherwise, when prosecuted. Any doctrine that would hold them legally objectionable in themselves would cover every military or political or society procession that ever assumed respectable proportions. All by-laws made to regulate them must fix the conditions expressly and intelligibly, and not leave them to the caprice of any one. This doctrine, as applied to public officers, was recognized in *Horn v. People*, 26 Mich. 221. It is quite as applicable to the common council, acting by resolution on particular cases. The law must be impartial and general or it is no law. *Waite v. Local Board of Garston*, L. R., 3 Q. B. 5. It is only where power is given to license that permissive action can be left to particular cases. If this were allowed in the case of processions, it would enable a mayor or council to shut off processions of those whose notions did not suit their views or tastes, in politics or religion, or any other matter on which men differ. When men in authority have arbitrary power, there can be no liberty."

The case of *Anderson v. City of Wellington*, 40 Kans. 173, involved the validity of a similar ordinance. The ordinance in question prohibited parades without the consent of the mayor, and in the absence of the mayor required the consent of the president of the council, city clerk or city marshal. The powers of the city council were similar to those considered in the Michigan case. The ordinance was held to be illegal and void. The court says:

"In addition to this, the ordinance must be reasonable; not inconsistent with the laws of the state; not repugnant to fundamental rights; must not be oppressive; must not be partial or unfair; must not make special or unwarranted discriminations, and must not contravene common right. These restrictions upon the power of the common councils of cities in this country have been frequently imposed, and almost universally recognized in all the courts of last resort that have expressed opinions upon the subject. The object of this ordinance, and the danger apprehended and to be avoided by its enactment and enforcement, as expressed by its terms, is to prevent the calling together of a large and unusual crowd of people on any of the streets, avenues or alleys of the city of Wellington. Then the question is this: Is a street parade with music or singing legally objectionable in itself, or does it threaten the public peace or the good order of the community? There are other questions made in the briefs of counsel for appellant, but we shall consider only the general legal characteristics of the ordinance; for if it is not legal, the other questions go with it; and if it is, they are probably not important enough to justify reversal in this particular case. This ordinance prevents any number of the people of the state attached to one of the several political parties from marching together, with their party banners and inspiring music, up and down the principal streets, without the written consent of some municipal officer. The Masonic and Odd Fellows organizations must first obtain consent before their charitable steps desecrate the sacred streets. Even the Sunday school children cannot assemble at some central point in the city and keep step to the music of the band as they march to the grove, without permission first had and obtained. The Grand Army of the Republic must be preceded in its march by the written consent of his honor the mayor, or march

without drums or fife, shouts or songs. It prevents a public address upon any subject being made on the streets. It prevents an unusual congregation of people on the streets under any circumstances without permission. The ordinance is framed on the theory that an unusual crowd or congregation of people upon one of the public streets of a city is either of itself a disturbance of the public peace, or that it threatens the good order of the community. A crowd of people is one of the most ordinary incidents of every-day life in any city of considerable size in this country. A fire, a runaway, an unusual sight, collects a crowd as if by magic; and it is not a fair estimate of the character and habits of the American people to assume that the public peace is threatened when numbers of them congregate. We do not believe that the legislative grant of power to the city council as enumerated in the sections above cited can be so construed as to authorize the city council to take from the people of a city and the surrounding country a privilege exercised by them in every locality throughout the land, to form their processions and parade the streets with banners, music, songs and shouts. It is an abridgement of the rights of the people. It represses associated effort and action. It discourages united effort to attract public attention, and challenge public examination and criticism of the associated purposes. It discourages unity of feeling and expression on great public questions, economic, religious and political. It practically destroys these great public demonstrations, that are the most natural product of common aims and kindred purposes. The power to pass such an ordinance should be clear and controlling before it can be upheld, and take away from the people the privilege that they have exercised ever since the organization of the government. Public parades of this character are not unlawful in their intent, purpose or result; they are not *mala in se*. If they are to be *mala prohibita*, it ought to be by some general law and not by local regulation.

* * * * *

"All by-laws made to regulate parades must fix the conditions upon which all persons or associations can move upon the public streets, expressly and intelligently, such conditions operating upon all of the same class alike and being reasonable in their requirements, and not oppressive in their operation, and must not give the power of permitting or restraining possession to an unregulated official discretion, and thus allow an officer to prevent those with whom he does not agree on controverted questions from calling public attention to the principles of their party or the objects of their organization in one of the most effectual methods known to associated effort."

In *Commonwealth v. Plaisted*, 148 Mass. 375, the defendant was prosecuted for playing on a musical instrument in one of the public streets of Boston in violation of the rules established by the board of police of said city. Section 1 of the rules is as follows: "No person shall sing, or play or perform on any musical instrument in the streets or public places of the city of Boston, except in connection with a funeral, a military parade, or a procession of a political, civic or charitable organization for which a police escort is provided, unless licensed thereto by the board of police for the city of Boston, as hereinafter set forth." Other sections provided for granting licenses and fixed a penalty. Defendant at the time was playing on a cornet and was part of a procession of the Salvation army which was without a police escort. The board of police

had full legislative authority, according to the court, to adopt rules "for regulating and restraining itinerant musicians in the streets and public places of Boston." A conviction was sustained by the supreme court. The defendant offered to prove that the Salvation army is a regular religious and charitable organization, with a set form of worship, and that the street parade is a part of that worship, and that he took part in the parade in question as a matter of religious worship only. This evidence was held to be incompetent by the trial court and upon this point the supreme court says: "It is also objected that the defendant's act of playing the cornet in the parade in the street was done as a matter of religious worship only. But this defense cannot avail to protect him from the consequences of an act which is made subject to a penalty under the law. *Reynolds v. United States*, 98 U. S. 145, 161; *State v. White*, 64 N. H. 48. The provisions of the constitution which are relied on securing freedom of religious worship, were not designed to prevent the adoption of reasonable rules and regulations for the use of streets and public places, and a religious body, however earnest and sincere, cannot avail itself of these provisions as an authority to take possession of a street in a city, in violation of such rules, for the purpose of public worship therein. The fact that there is no actual disturbance or breach of the peace, on the particular occasion, is immaterial. *State v. White*, 64 N. H. 48."

A statute of New Hampshire provides as follows: "No person shall, within the compact part of any town, fire or discharge any cannon, gun, pistol or other firearms, or beat any drum, except by command of a military officer having authority therefor, or fire or discharge any rockets, squibs, crackers or any preparation of gunpowder, except by permission of a majority of the police officers, or selectmen, in writing, or make any bonfire, or improperly use or expose any friction matches, or knowingly raise or repeat any false cry of fire." Defendants, who were apparently members of the "Salvation army," were prosecuted for beating a drum in violation of this statute. They admitted doing the acts charged and offered to prove that they were done in accordance with their sense of religious duty, and in worshipping God according to the dictates of their own consciences, and that they were not disturbing the public peace or the religious worship of others. The offer was rejected, and the ruling of the trial court was sustained. The court held that the statute was not in conflict with that article of the bill of rights designed to secure religious freedom and that it was in all respects a valid police regulation. *State v. White*, 64 N. H. 48.

The case of *Village of DesPlaines v. Poyer*, 133 Ill. 348, may be referred to as bearing somewhat upon the questions involved in the foregoing cases. An ordinance of the village declared public picnics and open-air dances a nuisance and prohibited any person to rent, use or allow to be used any yard, ground, grove or real estate within the village for that purpose. This was attempted under a general power to declare what should be a nuisance and to prohibit the same. The court held that this did not authorize the village to declare that a nuisance which was not so in fact, and held the ordinance unreasonable and void. See, also, *State v. Hughes*, 72 N. C. 25.

OURY ET AL. V. GOODWIN.

(Supreme Court of Arizona, Jan. 24, 1891.)

1. EMINENT DOMAIN. EXERCISE OF POWER BY TERRITORY. The territory of Arizona, though not possessing sovereignty, is clothed with authority to provide for the exercise of the power of eminent domain by the clause in the organic act which says: "The legislative power of this territory extends to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States."

2. THE QUESTION OF PUBLIC USE, HOW DETERMINED. To determine what is a public use authorizing the exercise of this power, cases and principles, rather than definitions, must be consulted.

3. It is well established by the weight of authority that in determining what is a public use, as contradistinguished from a private use, the peculiar physical conditions and necessities of the country are to be considered.

4. TAKING FOR PURPOSES OF IRRIGATION IS FOR A PUBLIC USE. That in the territory of Arizona the physical conditions are such, and the necessity for the use of water for irrigation so great and indispensable, as to authorize an act of the territorial legislature providing for the condemnation of right of way for ditches or canals by the agent of the territory for the use of thirteen or less farmers (or ranchers) in a farming neighborhood.

5. That the taking in this case was for a public use, because in pursuance of a law general in its character and terms, and providing for the irrigation of vast areas of land that would otherwise be wholly worthless and uninhabitable.

A PPEAL from district court, Maricopa county.

A. Buck for appellants. *W. J. Kingsbury* for appellee.

GOODING, C. J. This is an action under title 22, "Eminent Domain," Revised Statutes of Arizona, act approved March 9, 1887, to condemn real estate of appellant for the purpose of a canal or ditch for irrigating purposes. The appellant contends—First, that the legislature had no power to pass the act; second, that the court, and not the legislature, must be the final judge of what is a public use, as distinguished from a private use; third, that the use in this case is private, and not public.

These are questions of the utmost importance in this territory and have been presented and argued with ability commensurate with their importance. Was the act, "Eminent Domain," beyond the power and authority of the legislature, and, therefore, void? The organic law of Arizona provides: "The legislative power

of this territory extends to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States. But no laws shall be passed interfering with the primary disposal of the soil. * * *

The exercise of the power of eminent domain is certainly "a rightful subject of legislation." The various and imperative demands for the exercise of this power are so obvious as to preclude the idea that congress did not intend to confer it by the language used in the organic act. Public buildings, public roads, railroads, canals, water-works, sewers, gas, electric lights and all the modern improvements of a public character are dependent on the exercise of this power. Not only is the exercise of the power of eminent domain a "rightful subject of legislation," but this power is implied from the negative. "But no law shall be passed interfering with the primary disposal of the soil." The primary disposal, it is needless to say, is the disposal of it by the government when it parts with its title. The legislature has the power to determine and fix by what tenures lands in the territory shall be held, and under what forms titles shall pass, and who shall be the heirs at the death of the proprietor, and pass other like laws. The purpose of the organic act was to transfer from congress to the territorial legislature the power that congress had to pass laws for the people of the territory upon "all rightful subjects of legislation." The territorial legislature is substituted for congress, and clothed with the power of congress, except that it may not pass laws interfering with the primary disposal of the soil, nor tax the property of the United States, nor tax the lands or other property of non-residents higher than the lands or property of residents. That congress had the power to pass an act providing for the exercise of the power of eminent domain in the territory no one will question. That it has delegated this power to the territorial legislature we think is quite clear. Cooley Constitutional Limitations, 650, says: "In the new territories, however, where the government of the United States exercises sovereign authority, it possesses, as incident thereto, the right of eminent domain, which it may exercise directly or through the territorial governments."

Was the property taken for a private or public use? The court below found that the property in question was sought to be condemned for a "use authorized by law" and was necessary for

said use. The "statement of facts" is the evidence taken on the trial. It appears that the ditch in question is connected with the Tempe canal, and what is known as the "Southern Branch." Mr. Goodwin says: "Our branch is not an organization of its own. It is a part of the southern branch, in which Mr. Oury owns stock; it is a part of the same canal." He further states that: "The *zanjero* of the southern branch has charge of our canal; our canal is just a part of the southern branch." "The directors of the southern branch have control of our ditch as well as the southern branch; the whole business is under one set of directors." He further states that there are about eight thousand acres of land under the ditch, desert land, worthless without irrigation. He further mentions the names of thirteen persons who own stock, and states that none of these shareholders own more shares than is necessary to irrigate their land, and that it was the intention to give each shareholder sufficient to irrigate his own land. That others besides these shareholders owned and within the boundaries marked and as covered by the canal. The ditch is owned by a joint-stock association, not a corporation. That about one thousand inches of water was used through the canal, and the shareholders owned about two thousand acres. The one thousand inches of water run through the ditch was owned by the shareholders in the Tempe canal, and in the southern branch both. That one hundred inches would be used to one hundred and sixty acres, sometimes more. These facts, not contradicted, bear on the question of the use being a public use, or a purely private use. The other facts we deem it unnecessary to set forth, as the controversy arises on the facts above set out.

The amended complaint alleges, among other things, that the "plaintiff is a resident of the territory of Arizona, county of Maricopa, and an agent of the said territory for the purpose hereafter mentioned, by virtue of title 22 of the Revised Statutes of said territory, and as such agent brings this suit against the defendants for the purposes mentioned aforesaid;" and in paragraph 4, in substance, "that plaintiff, J. C. Goodwin, Robert G. Goodwin, James McClintock, Robert J. Martin, James Gilliland, T. G. Carlidge, Fisher G. Bailey, Douglas Lemon, Adams, and numerous other persons, farmers residing in the Missouri Flat neighborhood, county and territory aforesaid, are the owners of about

eight thousand acres of arable and irrigable lands in said neighborhood, wholly valueless without irrigation," etc.; and prays "to condemn the land for the purposes mentioned in the complaint." The damages, as found by the court, amount to \$124.50.

Do the facts of the case disclose that the use was a "use authorized by law" — in other words, a public use, in the view of the law? There is no definition of a public use that has yet been formulated to which we can go as a certain criterion. To know what is a public use which authorizes the exercise of the power of eminent domain, we must have recourse to cases rather than definitions — to uses that have been held to be public. There are certain uses about which there is no controversy. Property taken for state-houses, for court-houses, for school-houses, for public roads, and the like, which pass under the immediate control of the public authorities, are cases of clear and direct public uses. Property taken for railroads, canals and the like have also been conceded to be taken for public uses. In this class of cases the property is not in the possession of or controlled by the officers or agents of the public. Private individuals own and control the property. The title to the property is not in the public, nor is the possession or control, as in the case of court-houses, school-houses, etc. The public use consists in the right of the people to transit and transportation at reasonable rates. The public receives a benefit and advantage in this: that a new and better means of travel and transportation is afforded. In other words, in this class of cases it is conceded that the property of the individual owner is properly and lawfully taken, because the public receives a convenience and advantage, and a right to participate in the use. But there is another class of cases on an entirely different basis. In a number of the states where the physical conditions of the country offer inducements for the construction and erection of mills for grinding grain or sawing lumber, laws have been passed authorizing individuals and private companies to condemn mill-sites. These laws have been sustained in the states where they have been enacted, though questioned, criticised and often the authority denied, outside of the jurisdictions where the benefits are enjoyed. Upon what principle or reasoning can these laws be sustained? The public do not participate in the title to the property condemned; nor in the possession or control; nor in the

use direct, as in the case of railroads, canals, etc. The courts which have upheld these laws as constitutional rank among the first in the country. We refer to the following cases on this point, and other points in this case: *Beekman v. Railroad Co.*, 22 Am. Dec. 705; *Holyoke Co. v. Lyman*, 15 Wall. 507; *Tide Water Co. v. Coster*, 18 N. J. Eq. 518; *In re Application for Drainage of Lands*, 35 N. J. Law, 497; *Hartwell v. Armstrong*, 19 Barb. 166; *Shaw v. Railroad Co.*, 16 Gray, 415; *Norfleet v. Cromwell*, 70 N. C. 634; *Lowell v. Boston*, 111 Mass. 454; *Talbot v. Hudson*, 16 Gray, 417; *Mill Corp. v. Newman*, 12 Pick. 467; *Jordan v. Woodward*, 40 Me. 317; *Manufacturing Co. v. Fernald*, 47 N. H. 444; *Ash v. Cummings*, 50 N. H. 591; *Hazen v. Essex Co.*, 12 Cush. 477; *Harding v. Goodlett*, 3 Yerg. 41; *Hankins v. Lawrence*, 8 Blackf. 266; *Olmstead v. Camp*, 33 Conn. 532; *Venard v. Cross*, 8 Kans. 248; *Thien v. Voegtlander*, 3 Wis. 461; *Higginson v. Inhabitants of Nahant*, 11 Allen, 530; *Commissioners v. Armstrong*, 45 N. Y. 234; *County Ct. of St. Louis Co. v. Griswold*, 58 Mo. 175.

In *Holyoke Co. v. Lyman*, 15 Wall. 507, Clifford, J., says: "Authority to erect dams across such streams for mill purposes results from the ownership of the bed and the banks of the stream; or the right to construct the same may be acquired by legislative grant, in cases where the legislature is of the opinion that the benefits to the public will be of sufficient importance to render it expedient for them to exercise the right of eminent domain; and to authorize such an interference with private rights for that purpose, lands belonging to individuals have often been condemned for such purpose, in the exercise of the right of eminent domain, in cases where, from the nature of the country, mill-sites sufficient in number could not otherwise be obtained; and that right is even more frequently exercised to enable mill-site owners to flow the water back beyond their own limits in order to create sufficient power or head and fall to operate their mills." *Mill Corp. v. Newman*, 23 Am. Dec. 627, says: "But it is said that analogy fails when applied to laying bare the flats in order to get the water-power for mills, because the public have no right in respect to the manufactories, as they have to travel on the turnpike roads. But the public may be well said to be paid or compensated in the one as well as in the other case, and are benefited by the

These will be under the control of individuals. The company will either build or lease. They may build for themselves or lease to whom they please, and they are under no obligation to let the public participate in the immediate profits of their undertaking. If to establish this as a public benefit, it is indispensably necessary that the public should have the privilege of participating in it directly and immediately, then the proposition is not made out, and the defendants have no authority. But is not this view too narrow? Can public improvements be limited within such a compass? May we not in considering what shall be deemed a public use and benefit, look at the objects, the purposes and the results of the undertaking?" In this case, decided as early as 1832, it was held that the use was public, and not private, because of the incidental benefits to the public. There was to be no participation by the public, only the incidental benefits. The court further says: "Nor is it [eminent domain] limited to private corporations whose sole object, or even whose primary object it is to promote the public good. Such corporations are not to be found. Private interest or emolument is the *primum mobile* in all. The public interest is secondary and consequential."

And again: "The ever-varying condition of society is constantly presenting new objects of public importance and utility, and what shall be considered a public use or benefit may depend somewhat on the situation and wants of the community for the time being." 22 Am. Dec. 700. After referring to a number of cases wherein it has been held that "Mill Acts" are constitutional if the public have the right to participate, the court goes on to say: "But in many of the states the validity of statutes authorizing the condemnation of sites and the flowage of land, for the establishment and maintenance of mills and other manufactories, has been upheld on the broad ground, that, without regard to any actual right of the public in the use of them, they are of such public utility as to be in the nature of public improvements." *Olmstead v. Camp*, 33 Conn. 532; *Todd v. Austin*, 34 Conn. 78; *Occum Co. v. Manufacturing Co.*, 35 Conn. 496; *Grammell v. Potter*, 6 Iowa, 548; *Venard v. Cross*, 8 Kans. 248; *Harding v. Funk*, 8 Kans. 315; *Cogswell v. Essex Mill Corp.*, 6 Pick. 94; *Fiske v. Farmingham Co.*, 12 Pick. 68; *Mill Corp. v. Newman*,

12 Pick. 467; Hazen v. Essex Co., 12 Cush. 475; Miller v. Troost, 14 Minn. 365 (Gil. 282); Manufacturing Co. v. Fernald, 47 N. H. 444; Newcomb v. Smith, 1 Chand. (Wis.) 71; Fisher v. Horicon, 10 Wis. 351; Holyoke Co. v. Lyman, 15 Wall. 507, per Clifford, J.

In 47 N. H. 456, this question is put: "Or, to put the question in a general form, is it of such general public advantage that the streams and waters of this state should be brought into practical use for manufacturing purposes that a private right standing in the way of the enterprise, designed to accomplish extended and connected improvements in the water of a large stream, * * * is taken for a public use when taken to advance such an enterprise and remove an obstacle to its success? The act authorizing the property taken was sustained by the court. In the case of Tide-Water Co. v. Coster, 18 N. J. Eq. 521, it is held that the right of eminent domain could be employed for the purpose of reclaiming large tracts of tide-water land, and based its decision on the ground that 'it is the resulting general utility which gives such an enterprise a kind of public aspect, and invests them with privileges which do not belong to mere private interests.' The case of Head v. Manufacturing Co., decided by the supreme court of the United States at the October term, 1884 (113 U. S. 16; 5 Sup. Ct. Rep'r, 441), is instructive on the subject of the 'Mill Acts' of many states, and does not deny their constitutionality, even in the instances where there is no pretense of a right on the part of the public to participate, except in the resulting benefits. The general mill act of New Hampshire authorized 'any person or any corporation' to erect a dam flowing the lands of others, paying the owners of land flowed damages to be assessed 'by a committee or a jury.' In that case, as in this, it was claimed that it was taking private property for private use, contrary to the constitution. The taking was held to be lawful, on the right of the legislature to make laws affecting such cases. When property in which several persons have a common interest cannot be fully and beneficially enjoyed in its existing condition, the law often provides a way in which they may compel one another to submit to measures necessary to secure its beneficial enjoyment, making equitable compensation to any whose control of or interest in the property is thereby modified."

But we desire to quote from this decision of the highest court

in the land, and of so recent delivery, for the purpose of showing the strength of the authorities on the propositions involved in this case. First, the act which is sustained gives the right to "any person or any corporation" to flow the lands of others; that is, as held in many cases, to take them. Further it says: "General mill acts exist in a great majority of the states of the Union. Such acts, authorizing land to be taken or flowed *in invitum* for the erection and maintenance of mills, existed in Virginia, Maryland, Delaware and North Carolina, as well as in Massachusetts, New Hampshire and Rhode Island, before the Declaration of Independence, and exists to this day in each of these states except Maryland. * * * These were enacted in Maine, Kentucky, Missouri and Arkansas soon after their admission into the Union. They were passed in Indiana, Illinois, Michigan, Wisconsin, Iowa, Nebraska, Minnesota, Mississippi, Alabama and Florida while they were yet territories, and re-enacted after they became states. They were also enacted in Pennsylvania in 1803, in Connecticut in 1864, and more recently in Vermont, Kansas, Oregon, West Virginia and Georgia, but were afterward repealed in Georgia. In most of these states their validity has been assumed without dispute; and they were never adjudged to be invalid anywhere, until since 1870, and then in three states only, and for the incompatibility with their respective constitutions. "The principal objects, no doubt, of the earlier acts were grist-mills; and it has been generally admitted, even by those courts which have entertained the most restricted view of the legislative power, that a grist-mill which grinds for all comers, at tolls fixed by law, is for a public use. But the statutes of many states are not so limited either in terms or in the usage under them. In Massachusetts for more than half a century the mill acts have been extended to mills for any manufacturing purpose. And throughout New England, Pennsylvania, Virginia, North Carolina, Kentucky and many of the western states, the statutes are equally comprehensive." I have quoted this fully because the expression is that of the supreme court of the United States, and as recent as 1884; and because it shows that these acts are not sustained as constitutional because of the right having been exercised before the adoption of the constitutions, though many cases place the right or power on that ground; and, further, because in my opinion the mill acts of

the numerous states have far less foundation in public necessity or public utility than the water acts of Arizona, and because the similarity of the act is apparent. Under the mill acts any person or corporation may take private property for their use, the benefits being the general and resulting benefits to the public. Under the water acts any person or corporation may take right of way for water. The mill acts are held valid where there is no participation by the public. Is it then necessary that there should be participation direct under the water acts, to obviate the objection of its otherwise being a private, and not a public, use? In some of the drainage acts of the various states and territories there is no participation. I am not unmindful of the fact that some cases place the lawfulness of both the mill acts and the drainage acts under the power of the legislature, expressed by the court in the case from which we have just quoted, viz., the right to compel owners of private and separate property to join with other owners of private and separate adjoining property to improve the same *in invitum*, as by a common ditch, party-walls, etc. In the case of the exercise of the power of eminent domain, the individual has a portion of his property taken for which ample compensation is made. In the case of a resort to the other power, as in the drainage act or some of them, the part not taken may be sold at a sacrifice to pay assessment for the benefits. But there are many cases where the power must rest on the right of eminent domain, as where one man's land is flowed for the benefit of another man's mill; where a right of way is taken over one man's land for a ditch to drain the swamp lands of one or more of his neighbors. In all these cases the private property of the individual is taken, and it is of little concern to him under what particular power. If under the power of condemnation, he gets compensation for what is taken. If under the power to assess for improvement, a forced sale of all may result in a sacrifice of all. If the constitution cannot protect in the latter case, ought it to be invoked in the former to the detriment of the community, and against a general beneficial public policy, growing out of peculiar and extraordinary physical conditions of the country? The counterpart in principle to the proposition involved in this case is to be found in the drainage laws of various states, especially on the sea-coast. There it is to get water off the soil;

here it is to get it on to and in the soil. What difference can there be in principle? Some of the cases base the lawfulness of the drainage acts on the plea (may we not say in many cases pretext) of promoting the public health. Many other cases base the right on the broad ground of public benefit and utility. 22 Am. Dec. 705. Rodman, J., said, in sustaining the act to condemn: "If 'public utility' is synonymous with 'public use,' the case is still clearer. In many cases, therefore, it has been held, that acts for the drainage of lands by the power of eminent domain, where the chief object was to improve the land and render it fit for human habitation and cultivation, were constitutional and valid." *Tide-Water Co. v. Coster*, 18 N. J. Eq. 518; *In re Application for Drainage*, 35 N. J. Law, 497; *Hartwell v. Armstrong*, 19 Barb. 166; *Talbot v. Hudson*, 16 Gray, 417; *Norfleet v. Cromwell*, 70 N. C. 634. In the last case Rodman, J., said: "It is well known that in the Atlantic section of this state there are hundreds of thousands of acres of what is called 'swamp land,' which from the flatness of their surface, and the filling up of the natural courses of drainage, if any ever existed, cannot be relieved of the water which ordinarily covers them, and made fit for human habitation and cultivation, except by cutting artificial canals from them into some convenient creek or river, which must necessarily pass through the intervening lands of the riparian proprietors. If these canals can be cut only by the permission of the owners of the banks of the necessary outlets, this vast area of fertile land must remain for ages an uncultivated and unpopulated wilderness, and it will be entirely valueless to those who bought it from the state on the faith of its laws. An act which aims to remedy so great an evil, affecting so many persons now living, and so many more in the future, must be deemed one of general and public utility. * * * Roads and aqueducts are classed together in the Institutes as servitudes of the same public character. In the swamps, which the act in question chiefly affects, the canals are more important than the roads, as they must always precede them."

In these cases water must be taken off the lands to fit them for habitation and cultivation. In Arizona water must be taken on the lands to fit them for habitation and cultivation. *Lux v. Haggin*, 69 Cal. 304; 10 Pac. Rep'r, 674, says: "And while the

court will hold the use private when it appears that the government or public cannot have any interest in it, the legislature, in determining the expediency of declaring a public use, may no doubt take into consideration all the advantages to follow from such action; as the advancement of agriculture, the encouragement of mining and the arts, and the general, though indirect, benefits derived to the people at large from the dedication. It may be that, under the physical condition existing in some portions of the state, irrigation is not theoretically a 'natural want,' in the sense that living creatures cannot live without it. But its importance as a means of producing food from the soil makes it less necessary, in a scarcely appreciable degree, than the use of water by drinking it. The government would seem to have not only a distant and consequential, but a direct, interest in the use. Therefore a public use." Here the use of water for agriculture is held to be a public use. The same authority says: "We are only called on to say that sections of the Code which provide for taking water from riparian proprietors (on due compensation to supply farming neighborhoods) are constitutional and valid." In *Barbier v. Connolly*, 113 U. S. 31; 5 Sup. Ct. Rep'r, 357 (1884), Justice Field says: "But neither the amendment [14th amendment to the constitution], * * * nor any other amendment, was designed to interfere with the power of the state, sometimes called its 'police power,' to prescribe regulations, to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains." "Special burdens are often necessary for general benefit, for supplying water, preventing fires, lighting districts, cleaning streets, opening parks and many other objects." This was said in passing on and construing the constitutional provision, providing that no one shall be deprived of life, liberty or property without due process of law." "Due process of law" was held to mean affecting all alike who were of the same class or similarly situated. Take the case of ditching or draining companies in interior states where there are swamp lands. The owners of the swamp

lands are allowed to form ditching companies, and drain their lands and the lands of their neighbors, and assess their neighbors *in invitum* for the expenses incurred, and in some instances, as I have before said, selling at a sacrifice, the lands of their neighbors to meet the assessments. The ditches limited in some cases to little farming neighborhoods, comprising fewer in number than thirteen. No doubt these laws were first enacted on the theory of the general health, and may have been continued on that pretense long after everybody understood that the increased productiveness of the soil and the enhanced value of the lands constituted the *primum mobile* of the stockholders in the companies. These laws have been upheld in states where the judiciary might say it was a startling proposition to assert that one man might invoke the state's power of eminent domain to convey water over another man's land, paying him ample compensation therefor. In the one case a mere right of way, a slender strip of land, is taken—is appropriated—and compensation made therefor; in the other, a ditch or drain is made *in invitum*, and the benefits assessed by others, and must be paid or a forced sale result. Why should the first proposition be startling and the second accepted and approved?

In the state of Nevada it has been held that the law authorizing the condemnation of land to give access to mines, and to enable miners to carry on the business of mining, is constitutional. *Mining Co. v. Seawell*, 11 Nev. 402. In *Mining Co. v. Corcoran*, 15 Nev. 147, it was held constitutional to authorize the condemnation of lands for the purpose of operating a mine. In Colorado, statutes have been passed authorizing the appropriation of water by individuals for irrigating, and also the right to condemn land for right of way for irrigation. *Canal Co. v. Bright*, 8 Colo. 144; 6 Pac. Rep'r, 142; *Schilling v. Rominger*, 4 Colo. 100. I refer to these Nevada and Colorado cases as authority direct on the question involved in this case.

An examination of these cases, the mill site, the mining cases, the water cases, discloses the fact that the legislatures of various states have clothed private corporations and individuals with the power of eminent domain to make available the extraordinary natural resources within their borders. In a great number of these instances there is no participation by the general public,

and the public use consists in the purely incidental benefits. The peculiar physical conditions, and the great benefit that would result to the general public, seemed to justify a public policy authorizing the taking of private property to promote the general welfare in such cases. In most states and under ordinary conditions, laws like the mill-site acts, the dam acts, and the acts allowing land to be condemned to facilitate mining, and for irrigation, would not be passed, and might not be thought of sufficient public necessity and importance to be upheld if passed. The conflict in the authorities may be accounted for in the different conditions that exist in different states. The authorities are numerous that sites for manufacturing may not be condemned, though manufactories are of great public utility, and promote the general welfare in a pre-eminent degree. But the reason given is that a sufficient number of sites can be had by purchase, and without the necessity of condemnation. But a different ruling prevails where manufacturing is done by water-power, and mill-sites are few, as we have seen in the cases before referred to.

All condemnation acts are predicated on the proposition that private ownership must yield to public necessity. "Public necessity" often means, as illustrated in the above instances, public convenience and advantage. We have many other instances of what "public necessity" means. Though telephones are of very recent invention, and reach the very limited few, their use is held to be a public necessity; in other words, public convenience and advantage — sufficiently so, at least, to justify the exercise of the sovereign power of eminent domain. Natural gas, though limited to localities small in area, is held also to be a public necessity, and, therefore, to justify the exercise of this extraordinary power. Laws relating to the telephone and natural gas are good illustrations of the adaption of the law to the existing conditions, and the necessity for the enforcement of the doctrine that private property must yield, on compensation being made, to the public welfare. But recently both the telephone and natural gas were unknown, now both are necessary to the public use; that is, we submit to the public convenience and advantage. "Government must adapt itself to the existing condition and wants of society, or its efficiency is destroyed." *Swan v. Williams*, 2 Mich. 438. "This right of resumption [condemnation] may be exercised not only when the

safety, but also when the interest, or even the expediency of the state is concerned." *Beekman v. Railroad Co.*, 3 Paige, 73. Property may be taken under power of eminent domain, where the use is merely amusement or recreation, as for public drives or parks. *Higginson v. Inhabitants of Nahant*, 11 Allen, 530; *In re Mount Washington Road Co.*, 35 N. H. 134; *In re Bushwick Ave.*, 48 Barb. 9; *County Court v. Griswold*, 58 Mo. 175; *Commissioners v. Armstrong*, 45 N. Y. 234.

Speaking of the power of the state to exercise the right of eminent domain, in behalf of railroads, Judge Cooley says: "In such cases the property is not so much appropriated to the public use as taken to subserve some general and important public policy." *Ryerson v. Brown*, 35 Mich. 339. Chancellor Kent has written: "If the public interest can be in any way promoted by the taking of private property, it must rest in the wisdom of the legislature to determine whether the benefit to the public would be of sufficient importance to render it expedient for them to exercise the right of eminent domain, and to authorize an interference with the private rights of individuals for that purpose." 2 Kent Com. 340. I give due weight to the remark of Judge Cooley that "it would not be entirely safe" to apply with "much liberty" the words "in any way;" and the further remark of Judge Cooley that private property may not be taken "for objects which may merely tend to give an aspect of beauty," etc. I have looked into the various instances of the exercise of the right and power of eminent domain in the cases before cited, to ascertain whether it is necessary that the property appropriated should be actually appropriated to a direct public use, or to some use in which the general public might participate, as in the cases of railroads and canals, or whether the requirements of the constitution might not be met, if the use was in pursuance of some general and important public policy. In other words, may a state or territory, in view of its natural advantages and resources and necessities, legislate in such a way, exercising the power of eminent domain, that these advantages and resources may receive the fullest development for the general welfare, the laws being general in their operation? This territory is vast in extent, and rich in undeveloped natural resources. Mountains and deserts are not an inviting prospect, when viewed by a stranger in transit. But the

mountains abound in the precious metals, gold and silver, "the jewels of sovereignty;" and the deserts may be made to "bloom and blossom as the rose." The one great want is water. With this resource of nature made available, the mountains and the deserts may be made to yield fabulous wealth, and Arizona become the home of a vast, prosperous and happy people. But with water in this territory "cribbed, cornered and confined" it will continue and remain the mysterious land of arid desert plains, and barren hill-sides, and bleak mountain peaks. The legislature of the territory, seeing what was apparent to all, adopted at an early day a policy—"a general and important public policy." That policy was to protect against private ownership and monopoly the one thing indispensable to the growth, development and prosperity of the territory—the element that would serve to uncover the gold and silver hidden in the hills and mountains and transform the desert into a garden. Section 22 of the bill of rights provides: "All streams, lakes and ponds of water capable of being used for the purposes of navigation or irrigation are hereby declared to be public property, and no individual or corporation shall have the right to appropriate them exclusively to their own private use, except under such equitable regulations and restrictions as the legislature shall provide for that purpose." Section 3198, Revised Statutes, provides: "The common-law doctrine of riparian rights shall not obtain or be of any force or effect in this territory." Then provision is made for public and private *acequias*. Section 3201, Revised Statutes, Arizona: "All the inhabitants of this territory, who own or possess arable or irrigable lands, shall have the right to construct public or private *acequias*, and obtain the necessary water for the same from any convenient river, creek or stream of running water." Section 3202 provides: "Whenever such public or private *acequias* shall necessarily run through the lands of any private individuals not benefited by said *acequias*, the damage resulting to such private individuals on the application of the party interested shall be assessed by the probate judge of the proper county in a summary manner." These provisions were enacted early in the history of the territory, and probably existed as they are now when the territory was a part of old Mexico. The intention was to make the use of water, as much so

as practicable, within the reach of all, and to guard it against monopoly by private ownership on the one hand, and against being hemmed in, by the ownership of the adjacent land, liable to be acquired and held by speculators, on the other hand. The wisdom of this policy, under the physical conditions existing in the territory, must be apparent to every one. What better illustration could we have than the present case? Eight thousand acres of desert land can be brought under cultivation if the right of way can be obtained over intervening land; the value of the land taken is \$124.50, which the owner of the lands receives. What was the policy? Private ownership and monopoly of the streams, lakes and ponds was prohibited. They were reserved for and dedicated to the people. To make the water of these streams, lakes and ponds available, the right of way must be provided for ditches and canals over the lands of those who might become the owners of the soil on the borders of the streams or the margins of the lakes and ponds. Without this provision it is easy to see how a few individuals might throw themselves across the pathway of progress and development, by acquiring the lands on the margins of the streams and around the lakes and ponds. The water intended for the free and general use would be surrounded, hemmed in, and, without a right of way available under the law, the vast tracts of land lying on the outside must forever remain desert, or pay the tribute of extortionate and unconscionable demands. To prevent this, the laws above mentioned were enacted at the very beginning, and before titles were acquired. The laws of the territory, on the subject of water and water-rights, are not peculiar to this territory. Similar laws exist in Nevada, Montana, Colorado, Idaho, Dakota and New Mexico. The legislatures of all these states and territories have by their enactments declared their belief in the constitutionality of these laws, and in none of them have the courts held otherwise. It is in the first instance for the legislature to declare what are public uses to which private property may be appropriated. If a law declaring such uses, and making provision for such appropriations, is not in contravention of some constitutional provision, it is the duty of the courts to recognize and enforce it. If there is a doubt as to its constitutionality; if not clearly unconstitutional, being the act of the law-making power and a co-ordinate branch of the govern-

ment—it is well settled that it is the duty of the courts to treat and enforce it as a valid law. If the law is unwise in its provisions, or oppressive in its operation, the power that created it must be looked to to repeal or modify it. In this case the proceeding is in the name of the territory of Arizona, by James C. Goodwin as its agent. It conforms to the requirements of the statutes, and is not in contravention of the constitution of the United States, or the organic act of the territory, or any act of congress. The judgment below is, therefore, affirmed.*

Sloan and Kibbey, JJ., concur.

1. **Eminent domain—exercise of power by territory.**—The power of eminent domain is an attribute of sovereignty and does not exist in a territorial government unless granted by congress. *Newcomb v. Smith*, 1 Chand. (Wis). 71.

2. **Public use—irrigation.**—That works for irrigation are a public use is asserted by the writer in his work on Eminent Domain. See *Lewis Em. Dom.*, § 202, citing *Lux v. Haggin*, 69 Cal. 255, and *Cummings v. Peters*, 56 Cal. 593. The analogous questions discussed in the foregoing opinion, viz.: the mill acts, drainage acts, levee acts, acts for the development of mines, etc., are considered at length in the same work, §§ 178-201.

GRISWOLD ET AL. V. SAWYER ET AL.

(Court of Appeals of New York, Jan. 27, 1891.)

1. **LIFE INSURANCE. MEANING OF "LEGAL REPRESENTATIVES" IN POLICY.** An old man who had recently been reduced from large wealth to poverty and was largely in debt effected an insurance upon his life, payable to his "legal representatives." He had at the time a wife and several children dependent upon him for support. In a controversy after his death between the widow and children on the one hand, and his administrators on the other, over the proceeds of the policy, it was held that the words "legal representatives," should be construed to mean the widow and children, and that they were entitled to the benefit of the policy.

A PPEAL from supreme court, general term, third department.

Chas. G. Davis for appellants. *Otis A. Dennis* for respondents.

EARL, J. On the 25th day of July, 1879, the Connecticut Mutual Life Insurance Company, in consideration of the surrender of

* Reported in 26 Pac. Rep'r, 376.

a prior policy, issued a paid-up policy to Alfred H. Griswold, insuring his life for the sum of \$2,453, payable "to his legal representatives, ninety days after due notice and satisfactory evidence" of his death. He died December 26, 1888, and the insurance company has paid the amount insured into court. The widow and children claim it as legal representatives, and the administrators of the insured claim it. The cause was referred to a referee who decided that the sum was payable to the widow and children, and judgment was entered to that effect. From that judgment the administrators appealed to the general term, and there it was held that the sum was payable to them, and the judgment was reversed, and a new trial granted, and then this appeal was brought to this court.

The sole matter for our determination is the meaning of the words "legal representatives," as used in the policy. It is undoubtedly true that the strict, technical *prima facie* meaning of these words is administrators or executors, and that they must always have that meaning, unless it can be seen that they were used in a different sense. That these words have sometimes been used in statutes and decisions in a different sense, cannot be doubted. 2 Rev. St. 96, § 75; Lee v. Dill, 39 Barb. 516, 521; Drake v. Pell, 3 Edw. Ch. 266, 286; Greenwood v. Holbrook, 111 N. Y. 465; 18 N. E. Rep'r, 711; In re Hall, 2 Dem. Sur. 112; Coster v. Butler, 63 How. Pr. 311; 2 Redf. Wills, 401; Woerner Adm. 906; Cox v. Curwen, 118 Mass. 196; Farnam v. Farnam, 53 Conn. 262; 2 Atl. Rep'r, 325; 5 Atl. Rep'r, 682; Davies v. Davies, 55 Conn. 319; 11 Atl. Rep'r, 500; Halsey v. Patterson, 37 N. J. Eq. 445; Warnecke v. Lembca, 71 Ill. 91; Loos v. Insurance Co., 41 Mo. 538. In Warnecke v. Lembca it was held that the phrase "legal representatives," in the commonly accepted sense, means the "administrators" or "executors," but that this is not the only definition; that it may mean "heirs," "next of kin," or "descendants," and sometimes "assignee" or "grantee;" that the sense in which the term is to be understood depends somewhat upon the intention of the parties using it, and it is to be gathered, not always from the instrument itself, but as well from the surrounding circumstances. In Loos v. Insurance Co., the court was dealing with the word "representatives" used in a life policy, and it said: "'Legal representatives,' and 'personal representa-

tives,' in the general or professional sense, mean simply executors or administrators. Although this is the primary, legal meaning, they are often construed differently, if it is clear that the intention was to vest the estate in a different class of persons. That they mean executors and administrators will ordinarily be taken as true, where nothing is shown to raise a counter presumption. But the meaning is not so inflexibly attached as to prevail in all cases where it is manifest that another disposition was intended. The intention must control, and that intention is to be gathered by a view of the context, subject-matter and the purpose to be attained. The words have, therefore, been held to mean next of kin, when the circumstances of the case made it apparent that such a construction would effectuate the object had in view. The language used by the assured would seem to indicate that it was his intention, in case of his untimely decease, to make some provision for the surviving members of his family, and not that the money arising from the policy should go to his executors or administrators to be administered on as ordinary assets. Policies for a term of life insurance of this description are of frequent occurrence; and, where it is meant that the money resulting from the policy shall descend and be used as common assets, the invariable language is: 'To pay to the said assured, his executors, administrators or assigns.' The changing of the language and using terms of different expression, clearly import that the money was intended for the benefit of his heirs or next of kin, and that it was not to be administered on as assets by the executor or administrator."

Thus, as these words are not always used in the same sense, it is the province of construction in any case to ascertain the sense in which they were used, and for this purpose, the subject-matter, the surrounding circumstances, as well as the language used, may be considered. Such is the general rule for the construction of doubtful phraseology in all written instruments.

The general purpose of life insurance is to make provision for the family or other relatives or dependents of the insured, and in the vast majority of cases it is resorted to for that purpose and it is most probable here that the insured was actuated by that purpose. He left a widow and some children, who, at the date of the policy, were dependant upon him for support. He had then

recently become insolvent, and had been reduced from large wealth to poverty, and he was unable to pay his debts. It cannot be supposed that he effected this insurance for the purpose of devoting the comparatively small sum to the payment of his large indebtedness to his numerous creditors, leaving his family poor and dependent. It is more natural to suppose that he was then in his old age more solicitous to make some small provision for his family. While there is no proof for whose benefit the surrendered policy had been issued, as his creditors did not in his life-time take or claim that, or this policy, it is a reasonable inference that the prior policy was for the benefit of his family, and that the new paid-up policy was intended to take its place. Mr. Griswold was not a lawyer, and hence cannot be supposed to have used these words in their strict, technical, legal sense, but it is more reasonable to suppose that he used them in the general sense in which they are frequently used and generally understood by laymen. If he had formed a scheme in his mind to give this sum to his creditors, or to his executors or administrators, it is reasonable to suppose that he would have used other, and what to him would seem plainer and more appropriate and direct, words to express his meaning. It is not so important to inquire what the insurance company meant by these words, as it was wholly indifferent to it whether the sum insured was made payable to the executors, administrators or assigns of the insured, or to his family. The beneficiaries were such as the insured intended and mentioned to the company, and it is a just inference that he furnished or selected the language used to designate them. But it is quite significant, as indicating the intent of the company, that the words ordinarily found in policies where the sum insured is intended to be made payable to the executors or administrators of the insured for general administration are not found in this policy, and the changed phraseology may be taken to indicate a different understanding on the part of the company.

The word "assigns," which is usually found in policies which are assignable by the insured, is also omitted from this policy, indicating that the parties did not understand that they were dealing with an assignable policy. It is elementary law that, where a policy is for the benefit of persons named therein, to whom the sum insured is payable, it cannot be assigned without the consent

of the persons named, and all of them. The insured may destroy the policy by omitting to pay the premiums, and thus failing to keep it in life, but he cannot impair the interest of the persons named as beneficiaries by a surrender or assignment thereof. It is, therefore, begging the question to say that the insured could undoubtedly in his life-time have assigned this policy, and thus deprive his family of the benefit thereof. If we are right in the meaning we attribute to these words, he could not have done so. It may be asked, if he meant the insurance as a provision for his family, why did he not have their names inserted as beneficiaries? There was a wife and seven children, and he found the words "legal representatives" in the printed form of the policy, preceded by a blank, and he probably took these words as expressive of his meaning, rather than have the numerous names written in the policy. If this insurance was for the benefit of the general estate of the insured, and payable after his death to his administrators for general administration by them, then the insured could have assigned it in his life-time, and as a choice in action it would have been liable to be taken by his creditors. Can it be supposed that this old man, with a family somewhat dependent upon him, intended to take a paid-up policy, which his creditors could at once seize and take away from him under their judgments? If he had not intended to benefit his family, and had desired some present benefit for himself, he could probably have obtained from the company the present value of the policy in cash, and thus have appropriated it to his use. So, in whatever light we consider this matter, it is most probable that it was the intention to make the sum insured payable to the family of the insured. We cannot be absolutely certain that such was the intention, but we must adopt that construction which has in its favor the balance of probabilities. It is said that this is not a safe construction of these words, and that insurance companies, in accepting surrenders of policies, and persons who take assignments of them, may be deceived, and accept surrenders and assignments which are inoperative against the real beneficiaries. But the answer to this suggestion is that persons who deal with policies payable, like this, to "legal representatives," words known to be of doubtful meaning, must be sure of the intention of the parties to the policy, and, if they are not, they must not deal in them, and where they do deal

with them they act at their peril, as all persons do who deal with written instruments of doubtful phraseology. It would be a poor administration of justice in this case, where no fraud has been committed, to defeat the intention of the parties for fear that in some other case some incautious person may be deceived by these words of uncertain import. It was competent to prove the circumstances surrounding the insured at the time he took the policy as bearing upon the construction thereof. There was no dispute about them, and it was not needful that the referee should expressly find them. He could consider them in construing the policy, and so can we. It is not needful now to determine whether these words include the widow as well as the children, as the administrators have no interest in that question, and the children seem willing that she should share with them in the fund. Our conclusion, therefore, is that the order of the general term should be reversed, and the judgment entered upon the report of the referee affirmed, with costs. All concur (Peckham J., in result), except Andrews and Gray, JJ., dissenting.*

Life insurance — beneficiaries — construction of policy. Where an application for insurance specifies as beneficiaries applicant's wife "and children," and the policy designates them as the wife "and her personal representatives and assigns," which was received by assured without objection, and premiums thereon regularly paid, the application, as modified by the policy, will be deemed to be the contract, and the beneficiaries those mentioned in the policy. *Hunter v. Scott*, 108 N. C. 213; 12 S. E. Rep'r, 1027.

Policies payable by their terms to the testator's legal representatives, if specifically devised by the will, become a part of his estate, and not the property of the widow; but where it is clear that he intended by his will to dispose of his entire property, including the life insurance as a part of his estate, *held*, that the widow will take the life insurance, specifically devised in general terms to her use for life, as effectually as if the insurance had been specifically named in the will. *Fox v. Senter*, 83 Me. 295; 22 Atl. Rep'r, 173. And see generally, *Johnson v. Supreme Lodge*, etc., 3 Am. R. R. & Corp. Rep. 77, and note.

* Reported in 24 N. E. Rep'r, 464.

JOHNSON V. MAINE & N. B. INS. CO.

(Supreme Court of Maine, Feb. 22, 1901.)

1. **LIFE INSURANCE. INSANITY.** Unless otherwise apparent from the context, the word "insanity," in statutes and contracts, means inability to reason and will intelligently.

2. **STATEMENTS IN APPLICATION. WARRANTY OF THEIR TRUTH.** When a party makes unqualified statements in a contract, and therein stipulates that they are full, complete and true, he stipulates for actual, absolute truth, and not for truth according to his belief or understanding.

3. **EFFECT OF AGREEING THAT ALL ARE MATERIAL.** When a party stipulates in a contract that all his statements therein are material, and that falsity in any of them shall avoid the contract, the court cannot, without an enabling statute, pronounce any of them immaterial.

4. **IF SO AGREED ANY FALSE STATEMENT AVOIDS POLICY.** In a life insurance contract, one of the statements by the assured, stipulated by him to be material and true, viz., that his brother never had insanity, was untrue. *Held*, that it avoided the contract.

REPORT from supreme judicial court, Penobscot county. This was an action brought by the plaintiff, as one of the beneficiaries named in a certificate or policy of life insurance issued by the defendants, to recover the money payable to him after the death of the insured, who was his half-brother. Plea was the general issue, with brief statement alleging fraud, and a breach of warranty by the insured in his application. The case is stated in the opinion.

A. W. Paine for plaintiff. *Baker Baker & Cornish* for defendant.

EMERY, J. On report. The material facts established by the admissions and evidence are these: James H. Smith and the Maine and New Brunswick Insurance Company made a contract of insurance upon the life of Smith by the company, partly payable upon Smith's death to the plaintiff, his half-brother. This contract was evidenced by two written instruments — one called the "application," signed by Smith; the other, called the "policy," signed by the proper officers of the company. All the terms and conditions of the contract were embraced in these two writings.

The application contained various statements, and questions and answers thereto, and at the end were the following certificates signed by the applicant, Smith:

(1) "I have verified the foregoing answers and statements, and find them to be full, complete and true. I do also adopt as my own, whether written by me or not, each foregoing statement, representation and answer, and I agree that they are all material.
* * * "

(2) "I do hereby declare and warrant that the foregoing answers and statements are full, complete and true; and I agree that this declaration and warranty, together with the preceding agreements, shall form the basis of the contract between the undersigned and the Maine and New Brunswick Insurance Company, and are offered to said company by me as a consideration of the contract applied for, and are hereby made a part of the certificate to be issued on this application; and if there be any concealment, misrepresentation or false statement, or statement not true, made herein, then the certificates to be issued hereon shall be null and void. * * * "

The policy (or certificate) contained a stipulation that it was issued upon the condition that the statements and declarations made in the application were true, and that the application was a part of, and the basis of, the contract of insurance.

In the application, among others, was the following question and answer:

No. 16. "Have either of your parents, brothers or sisters ever had insanity, consumption, chronic cough or any scrofulous, constitutional or hereditary disease?"

"Answer. No."

At the time of making this application, however (July 8, 1888), the applicant Smith had a brother, John T. Smith, who was then an inmate of the Central Lunatic Asylum, Va., having been committed to that asylum in 1880. He was a monomaniac, made so by religious excitement. He was quiet, peaceable and harmless. He was employed daily at the pump-house, assisting the firemen, and did other light work. His mental disease was of the class called by physicians "*chronic dementia*." His physical health was good, and, so far as appears, was unaffected by his mental condition.

James H. Smith, the applicant, had full knowledge of the mental condition of his brother John, as above described (so far as a person unskilled in mental disease would observe or appreciate

it), at the time of the making of this contract upon his own life, but made no other statement about it in his application than his above answer to question No. 16.

James H. Smith, the applicant, died March 16, 1889, of acute mania, in the Westboro' (Massachusetts) Insane Hospital, to which he had been committed February 25, 1889. While in the hospital he was noisy, incoherent, untidy, destructive and delirious. The immediate cause of his death was "exhaustion of acute mania." The plaintiff, a beneficiary under the policy, having observed all the legal preliminaries, brought this action against the company to recover the amount specified in the policy to be paid to him upon the death of the insured. The defendant company defend the action, contending, under the proper pleadings, that the applicant's negative answer to question No. 16 in the application, and above quoted, was erroneous; and that such error of answer or statement rendered the contract void, under the express stipulations in the application and policy. The plaintiff opposes this contention of the company, with various counter-propositions, which we now proceed to consider.

1. The plaintiff contends, first, that the answer was not in fact erroneous; that the applicant's brother John was not insane in the sense in which the word "insanity" was used in question No. 16. His argument is that the word "insanity," used in that connection in an application for life insurance, only means such forms of insanity as affect physical health, and tend to shorten physical life, and does not include in its meaning a case of chronic *dementia*, where the patient is quiet and harmless, and in physical good health.

Etymologically, insanity signifies unsoundness; lexically, it signifies unsoundness of mind, or derangement of the intellect. Medical science, with its usual zeal, has deeply investigated the various forms, symptoms, causes, results and manifestations of mental unsoundness or disease, and has discovered numerous kinds of such diseases, to which it has given appropriate technical names. Dr. Hammond (late surgeon-general United States army), for instance, classifies these kinds into seven classes, and thirty-three subclasses (not claiming, however, this to be a natural classification.) *Dementia* and mania are both specified in this classification. But, however necessary such an analysis and classification of men-

tal diseases may be to the science of medicine, they are impracticable and unnecessary in legal science. In law every mind is sound that can reason and will intelligently in the particular transaction being considered; and every mind is unsound or insane that cannot so reason or will. The law investigates no further. Whether this last-named mental condition be congenital, or the result of arrested mental development, or of religious excitement, or of physical disease, or of dissipation, or of old age, or of unknown causes; whether it be casual, temporary or permanent; whether it be personal or hereditary; whether it be manifested in the mildest *dementia* or the wildest mania — it is expressed in law by the same word, "insanity." When this word occurs, unexplained or unlimited, in any statute, contract or other legal literature, it signifies any derangement of the mind that deprives it of the power to reason or will intelligently. The mind of John T. Smith, the brother, suffering from chronic *dementia*, as described, had unquestionably lost that power of reasoning or willing, and to say in the application that he had no insanity was clearly untrue. *St. George v. Biddeford*, 76 Me. 596.

2. The plaintiff contends, again, that, whatever be the legal meaning of the word "insanity" in the application, the applicant did not understand it to include his brother's case; that although the applicant knew the facts as to his brother's mental condition, he did not know that such condition was one of insanity; hence that his negative answer was correct, according to his best knowledge and belief. If the applicant was sincere in such a belief, it would acquit him of fraud in so answering; but his sincerity is not enough to uphold a contract stipulated to be based on the actual correctness of his answers. He stipulated absolutely, in his application, that his answer was "full, complete, and true." Such a stipulation calls for truth in fact, not merely for the applicant's knowledge and belief. His answer was unqualified. It purported to state an absolute fact. He did not qualify it by any reference to belief or understanding. The other party was to rely upon the language used, the outward expression, without inquiring into the inward belief. Had he stated his answer to be merely according to his belief, and such answer had been accepted, his belief might be material and sufficient, as in *Insurance Co. v. Gridley*, 100 U. S. 614, cited by plaintiff's counsel; but

as the answer stands in this case, the applicant's belief and sincerity are clearly immaterial and insufficient.

3. The plaintiff contends, still again, that the answer cannot affect the contract, because, if untrue, it was immaterial. His argument here is that the insanity of the brother did not affect his physical health, is not shown to be a family taint, did not in any way increase the risk of insuring the applicant's life, and hence was an immaterial matter not in any way affecting the contract. We do not think, however, the question of the materiality of the answer is now open for consideration. That question was closed by the parties themselves. They stipulated that this answer, with all other answers, was material. The company was under no obligation to insure the life of the applicant. It was a private corporation, doing a private business. It could admit or reject applicants at will. It could impose such terms and conditions (not illegal) as it pleased, however immaterial or trivial they might appear to the court. It had a right to stipulate that it would not insure the life of any person whose brother had ever had any kind or degree of insanity. It had a right to stipulate that any insanity in any relative should be regarded as material to the risk. The applicant could decline to enter into a contract for insurance on those terms and conditions, or he could accept them and close the contract.

The legislature of this state has interposed to some extent in fire insurance contracts, and enacted that certain representations or statements in the application must be shown to be in fact material, before they shall be held to avoid the contract. It is not competent, in such cases, for the parties to conclude for themselves a question which the statute declares shall remain open for the court. There is no such statute affecting life insurance contracts. The parties to these contracts are left free to agree upon their own terms, conditions and stipulations (except as to forfeiture for non-payment of premiums, there being a statute regulating that). Until a statute shall intervene, a court of law must recognize the contract the parties make, and not venture to change it in any way. Whatever the parties say and agree in their contract shall be material (always assuming it not to be unlawful), the court cannot declare to be immaterial. *Jeffries v. Insurance Co.*, 22 Wall. 47; *Insurance Co. v. France*, 91 U. S. 510.

The other contentions of the plaintiff are simply different statements of those above considered. The plaintiff's counsel has argued his several propositions in a very full and elaborate brief, which we have thoroughly studied. He has cited many authorities, which we have painstakingly examined, as, however clear our own views, we would hesitate to run counter to the general current of judicial decisions. We think, however, that in every seemingly similar case, where a different result has been reached by a court, it will be found that the language of the application or policy was materially different from the language in this case, or else some statute intervened to modify the language. Thus, in *Moulor v. Insurance Co.*, 111 U. S. 335; 4 Sup. Ct. Rep'r, 466, so confidently cited by the plaintiff's counsel as conclusive, there was no stipulation in the contract that each question and answer should be regarded as material. The court naturally held that, in the absence of such a stipulation, the company must show to the court the actual materiality of the statement complained of. We do not think any court, in the absence of a modifying statute, has gone to the extent of expunging from a contract, or disregarding in its construction, any statement or item which the parties distinctly and in terms agreed should be regarded as material and essential to the contract.

In this case, it was agreed by the parties that the sixteenth question and answer were material, and that an untrue answer should vitiate the contract. The answer was untrue, and we must give effect to the agreement of the parties, and declare the policy, for that reason, void.

Judgment for the defendant.

Peters, C. J., and Libbey, Foster, Haskell, and Whitehouse, JJ., concur.*

1. **Life insurance — conditions avoiding policy — failure to pay premium — waiver.** — A life insurance policy contained a forfeiture clause for the non-payment of the premiums quarterly, and provided that no agent of the company should have power to extend the time of their payment. In an action on the policy the court charged that the jury should find for defendant, unless the latter, by its officers, with knowledge of the facts, waived the quarterly payment of premiums, and that the burden of showing such waiver was on plaintiff. Held, that it was not reversible error to refuse a further instruction requested by defendant that the mere suggestion of its general agent, that the insured might perfect an arrangement to pay his premiums annually, would

* Reported in 22 Atl. Rep'r, 107.

not amount to a waiver of the condition in the policy requiring them to be paid quarterly. *Penn. Mut. Life Ins. Co. v. Keach*, 184 Ill. 583; 26 N. E. Rep'r, 106. When the policy provides that agents are not authorized to make, alter or discharge contracts, or waive forfeitures, or to receive premiums in arrears, except upon a written application in prescribed form for a revival, which must be acted on by the company itself, it is error for the court to refuse to charge the jury that a collecting agent had no power to waive the forfeiture, or to bind the company by receipt of the premiums in arrear, without an application for revival, and for the court to charge that payment by the assured, and receipt by the agent, of the premiums in arrear, for the purpose of revival, would warrant a recovery on the lapsed policy. *Metropolitan Life Ins. Co. v. McGrath*, 52 N. J. Law, 358; 19 Atl. Rep'r, 886.

Where a policy provides that, if the quarterly premiums are not paid at maturity, it shall cease, and that the acceptance of any premium after maturity shall not be a waiver of payment of the future premiums when due, and that no person except the president and secretary, acting together, shall have power to alter the contract or waive forfeitures, the acceptance of three previous premiums after maturity, and the promise of the agent, after the maturity of another premium, to accept it if paid before a certain date, constitute no binding waiver of the forfeiture incurred by the failure to pay at maturity; and, the insured having died before paying the overdue premium, the policy is void. *Lantz v. Vermont Life Ins. Co.*, 139 Penn. St. 546; 21 Atl. Rep'r, 80.

2. *Misrepresentations by assured — knowledge of agent — waiver.* — A life insurance company cannot defeat a recovery on a policy which provides that it shall be void if the application contains any untrue statement, when it appears that its own agent placed the age of the insured, who was unable to read or write and did not know his own age, at less than it really was, stating at the time that he would make the insured out younger than he was. *Keystone Mut. Benefit Ass. v. Jones*, 72 Md. 363; 20 Atl. Rep'r, 195. To the same effect: *Michigan Mut. Life Ins. Co. v. Reed*, 84 Mich. 524; 47 N. W. Rep'r, 1106; *Follette v. United States Mut. Acc. Assn.*, 107 N. C. 240; 12 S. E. Rep'r, 870.

When solicited to take a policy, the insured told the company's agent that his application had been rejected by another company. The agent filled out an application, and, to the question whether any former one had been rejected, he wrote the answer "No," without the knowledge of the insured, who signed the paper without reading it. The policy provided that the insured adopted as his own, admitted to be material, and warranted as full, complete and true, each of the answers, whether written by his own hand or not. Held, that the company could not treat the answer as a warranty, and avoid the policy for its falsity, also that a reformation of the policy was not essential to a recovery. *Germania Life Ins. Co. v. Lunkenheimer*, 127 Ind. 536; 26 N. E. Rep'r, 1082.

A provision in an accident policy that none of its conditions can be waived by any agent of the company is valid, and a condition that the insurance does not cover a death resulting from intoxication is not waived because the agent who received and filled out the application knew that the applicant was an intemperate man, though the application stated that his habits were correct and temperate. *Cook v. Standard Life & Acc. Ins. Co.*, 84 Mich. 12; 47 N. W. Rep'r, 568.

3. *Rescission of policy.*—If the agent of an insurance company, without the knowledge of the assured, inserts in the application such misrepresentations as would, if made by the assured, avoid the policy, the assured may rescind the contract, though the policy binds the company. *Mich. Mut. Life Ins. Co. v. Reed*, 84 Mich. 524; 47 N. W. Rep'r, 1106.

THOMPSON V. WHIPPLE ET AL.

(Supreme Court of Arkansas, Feb. 7, 1891.)

1. **CITY COUNCIL. POWERS OF PRESIDING OFFICER IN PRESERVING ORDER. FALSE IMPRISONMENT.** The power of a mayor, as the presiding officer of a city council, extends no further upon the occurrence of indecorum on the part of any member, than to bring the fact to the attention of the assembly, which may, if it sees fit, after the member has been heard, order him to withdraw, pending its consideration and action, and it is the duty of the president to enforce that order; but he has no power, in the absence of threatened violence to other members, to order the offender into the custody of the executive officer of the assembly, and exclude him from its deliberations, and, if he assumes to do so, both he and the executive officer who carries out his orders are liable in damage for false imprisonment.

A PPEAL from circuit court, Pulaski county, J. W. Martin, judge.

Compton & Compton and *Blackwood & Williams* for appellant. *E. W. Kimball* and *Morris M. Cohn* for appellees.

HEMINGWAY, J. The answer admits the imprisonment of the plaintiff, and seeks to justify it. The defendants, Whipple and Botsford, were, respectively, the mayor and chief of police of the city of Little Rock, and the plaintiff was alderman of the city. By virtue of their offices, the plaintiff was a member of the city council, defendant Whipple its president, and defendant Botsford its executive officer. The circumstances of justification set up in the answer are that the plaintiff, at a meeting of the city council, "conducted himself in an unparliamentary, disorderly, boorish and insulting manner toward its presiding officer and the council; that he addressed the council while in his seat, replied to a remark of the mayor in a disrespectful tone and manner, and asked, "What are you going to do about it?" that he kept his hat on his head during the meeting; and that, while retaining

his seat, "in a loud and defiant tone," he seconded a motion that the mayor preserve order. Other like acts of disorder are alleged, and that plaintiff was called to order by the defendant Whipple, and admonished as to his misconduct; that he failed to observe the admonition, and continued to be disorderly; that he was on that account conducted out of the council chamber, by the chief of police, under an order from the mayor; that an ordinance of the city then in force, authorized the mayor "to preserve order and decorum, and to decide all questions of order, subject to an appeal to the council." The legal sufficiency of the answer is the only question in the case. The statute provides that the mayor shall be, *ex officio*, president of the council, and shall preside at its meetings during the term for which he shall have been elected. Mansf. Dig., § 807. It does not define the character or extent of his powers or duties as president of the council, but necessarily implies that they shall be such as are ordinarily incident to the position, and such as may be prescribed by any proper rules of procedure that the council might adopt. Id. § 806. The only rule of the council pleaded provides that "the president shall preserve order and decorum." It does not define the means that the president may employ to preserve order and decorum, but leaves that subject to be determined by the usages that prevail in deliberative assemblies. So that, if the circumstances relied on justify the forcible exclusion of plaintiff from the council chamber, it is because such authority is inherent in the office of president, according to the laws that regulate the proceedings of such bodies. The ordinance is only declaratory of the common law; it, neither in terms nor spirit, increases or extends the duties or powers usually pertaining to the position. What, then, are such duties and powers according to the general usages of deliberative bodies? They comprise the duty and power to preserve order and decorum during the deliberations of the body. It is said to be the privilege of any member, and the special duty of the presiding officer, to take notice of any offense during deliberation, and to call the attention of the assembly to it. In such cases the president declares to the assembly that a member named is guilty of irregular or improper conduct, and specifies it. When it has been stated by the president, the member is entitled to be heard in exculpation. The matter is thus fairly presented to the house for its considera-

tion and action, pending which the member should withdraw. Delicacy and custom require that he withdraw, in order that the matter may be fully discussed and considered, free from any restraints of his presence. If a sense of propriety does not constrain him to withdraw, the house may order that he do so, but his failure to do it is a matter for the action of the house. If the member disregards its order, the president may enforce it. Thus far and no further can we find that the president is authorized to order that a member be excluded. Cushing's Rules of Pro. & Deb., §§ 40, 41; Cush. Law & Pr. Leg. Assem., § 664. When the president has called an offending member to order, and stated the matter of the offense to the house, it seems that he has fully discharged his duty and exhausted his powers in the premises. He thereby transmits the further disposition of the matter to the house. The power to punish is not among his prerogatives; that belongs exclusively to the house, and he can never exercise it save as it is expressly ordered by the house. If he has other powers, the fact has escaped the recognition of writers. They treat him as the servant of the house, vested with powers to act in ordinary cases, but authorized only to execute the will of the house in unusual or extraordinary cases. It is said that the powers of the speaker are well expressed by Mr. Speaker Lenthall, who, when Charles I came into the house of commons, and asked him whether any of five members that he came to apprehend were in the house, whether he saw them, and where they were, replied: "May it please your majesty, I have neither eyes to see, nor tongue to speak, in this place, but as the house is pleased to direct me, whose servant I am."

But it is argued that the president may enforce the exclusion of an offending member, not by way of punishment, but for the purpose of putting an end to existing disorder. To sustain this view, we are cited to the case of *Parsons v. Brainard*, 17 Wend. 522. The decision in that case was controlled by a statute of New York, and no reliance is placed by the opinion upon any principle of force out of that state.

Mr. Cushing says that when, in the course of proceedings, a quarrel arises between members, which the speaker sees may lead to injurious results, it is his duty to interfere at once, without waiting for the previous order of the house, and, by reason of

retraction or apology, compel such members to settle their quarrel immediately, or, by ordering them into the custody of the sergeant at arms, prevent them from leaving the same until they pledge themselves that the quarrel shall go no further; that the propriety of this course is more manifest where the members resort to violence; and that the speaker may, instead of proceeding at once, wait for the house to indicate such course as it may think proper; that in such cases immediate action by the speaker has been the rule in England, while the rule in this country has been to await the action of the house. Cush. Law & Pr. Leg. Assem., § 666. It will be observed that the arrest is made in such cases to prevent the impending commission of personal violence, and to detain the offending member in the house to be dealt with by it after it has heard a statement of his offense and his statement in exculpation. Both reasons would be without force in a case of forcible exclusion for disorderly and indecorous behavior, not threatening personal injury; for there is no threatened violence to be prevented, and the exclusion of the member precludes a hearing and order of the house as to the offensive matter. Besides, when the president orders an arrest to prevent an injury being done to another member, he does more than any other person would be justified in doing anywhere. We find no authority for the arrest of a member by order of the president, except as we have stated. If noise or tumult in the house—breaches of good order and decorum in the course of proceeding—or an exhibition of disrespect and contempt for the president, would justify a forcible exclusion by him of an offending member, it cannot be that the history of proceeding in deliberative bodies would furnish no instance of the assumption of such power. Such history furnishes many instances of such offenses at times when feeling was more potent in the assembly than reason, and when the president, partially at least, under its sway, did not decline the exercise of all his conceded powers; but if any president has ever thus sought to check raging disorder, or command respect for his person, the instance is not called to our attention. As occasions for the exercise of such authority, if justified by usage, have often arisen, under circumstances favorable to its exercise, and as it does not appear to have been exercised on such occasions, we conclude that it does not exist. It does not appear by the answer that plaintiff's conduct

in the council meeting threatened personal injury to any of its members; therefore, the case does not come within the rule referred to, that might authorize his arrest by the order of the mayor. In the light of the answer, it appears that the council might have taken such action as it saw fit, with reference to plaintiff's misconduct, without hazarding the personal security or safety of its members. It might then and there, upon presentation of the matter, have ordered his suspension or expulsion, if that was deemed necessary to stop or punish his misconduct. There was no such violence as to arrest the progress of business, or to require the exclusion of plaintiff in order that his offense might be dealt with. His imprisonment was, therefore, unnecessary and illegal. The judgment will be reversed, and the cause remanded, with directions to sustain the demurrer to the answer.*

City councils — power of presiding officer.—The section of Cushing referred to in the foregoing opinion is as follows: "When, in consequence of words spoken in debate, or in course of any other proceeding of the house, or of a committee, either select or of the whole or otherwise, a quarrel arises between members, which the speaker sees may lead to serious results, it is his duty to interfere at once without waiting for the previous authority of the house, and, by means of a retraction or apology, compel such members to settle their quarrel immediately, or, by ordering them into the custody of the sergeant at arms, prevent them from leaving the house until they pledge themselves that the quarrel shall go no further. The propriety of this course is still more manifest when the parties, as sometimes happens, resort to blows or other acts of violence. The speaker, instead of proceeding at once, of his own authority, or the implied sanction of the house, may wait for it to take or indicate such course as it may think proper. The former method is most generally adopted by the speaker of the house of commons; the latter has been most commonly pursued by presiding officers in this country." Cushing Law Leg. Assem., § 666.

STUBBINGS V. VILLAGE OF EVANSTON.

(Supreme Court of Illinois, Jan. 22, 1891.)

1. EMINENT DOMAIN. TAKING LAND SUBJECT TO LEASE. DAMAGES. Where part of a tract of land subject to lease is condemned for public use, the tenant's liability for rent is not affected thereby, and damages should be assessed on that basis.

2. LANDLORD AND TENANT AS PARTIES. GRANTING NEW TRIAL TO ONE ONLY. Where separate verdicts are rendered in a condemnation suit in favor

* Reported in 15 S. W. Rep'r, 604.

of the tenant and the reversioner of certain land, the judge may grant a new trial to one defendant without setting aside the verdict as to the other.

A PPEAL from Cook county court, Richard Prendergast, judge.

Hoyme, Follansbee & O'Connor and *Robert H. Patton* for appellant. *George S. Baker* for appellee.

CRAIG, J. This was a proceeding brought by the village of Evanston to condemn certain property owned by appellant, Wilson H. Stubbings, for the purpose of extending the lake shore drive. Appellant's property was located on the lake shore, and north of Dempster street, extending from the lake shore along the north side of Dempster street four hundred and eleven feet, and being one hundred and ninety-two feet deep north of Dempster street. Under the petition, the village sought to condemn a piece of land one hundred feet wide, north westerly through the property. Appellant's property was leased to one David O'Leary, who used the property for a coal-yard, and a place for landing coal. The lease does not expire until 1898. The appellant and O'Leary were made parties to the proceeding. Both filed a cross-petition, appellant claiming damages to the property not taken, and O'Leary claiming damages to his interest in the part not taken. As a result of the trial, the jury returned a verdict in favor of appellant for \$5,450, as damages for the property taken, and that he was entitled to no damages as to property not taken. The jury also returned a verdict in favor of O'Leary for \$3,000, for damages to his leasehold interest in property taken, but that he was entitled to nothing as to property not taken. Appellant and O'Leary both applied for a new trial. The application of the former was denied, but that of the latter allowed.

On the trial of the cause the court refused to instruct the jury that, if the strip of land and buildings in question were taken for the purpose of the drive-way, the rental to be paid by O'Leary under his lease would be abated to the extent of the fair rental value of the lands so taken; that the value of O'Leary's leasehold estate in the premises was a sum equal to the difference, if any, between a fair rental value of the demised premises, for the balance of his term, and the amount of rent which he would have to pay therefor under his existing lease thereon. But, on the

other hand, the court gave to the jury an instruction as follows: "When the owner of property makes a lease to a tenant, he conveys an estate in the property known as a 'leasehold estate,' and such estate is, in law, entirely separate and distinct from the estate that the landlord retains. In case part of the property is taken under such proceedings as these, the tenant remains bound to pay rent for the whole according to the terms of the lease. In this case the petitioner must pay to the landlord an amount equal to the value of his estate in the strip of property taken, and an amount equal to whatever damage, if any, is done to his estate or interest in the remainder; and the petitioner must also pay to the tenant an amount equal to the value of the tenant's estate in the strip taken, and an amount equal to whatever damage, if any, is done to the tenant's estate or interest in the portion of the property not taken." The ruling of the court on the instructions is relied upon as error. Indeed, the ruling in this regard is the principal question presented by the record.

The general rule no doubt is that eviction of the lessee from the premises by a paramount title will discharge him from the payment of any rent which may fall due by the terms and conditions of the lease, after eviction. But, where a part of leased premises may be taken under the power of eminent domain, can such a taking be regarded as an eviction? 1 Washburn Real Property (vol. 1, p. 342), in speaking on this subject, says: "It has sometimes been attempted to apply the principle of eviction from a part of the premises where lands under lease have been appropriated to public use, under the exercise of eminent domain; * * * but the better rule, and one believed to be adopted in most of the states, is that such a taking operates, so far as the lessee is concerned, upon his interest as property for which the public are to make him compensation, and does not affect his liability to pay rent for the entire estate according to the tenor of his lease. And this extends to ground rent; such taking does not abate any part of the rent due." *Parks v. City of Boston*, 15 Pick. 198, is an interesting case on the question. It was there held: "Where part of a lot of land under lease is taken by the mayor and aldermen of Boston for the purpose of widening a street, the lease is not thereby extinguished; nor is the lessee discharged from his liability to pay the reserved rent during the

residue of the term, but the lessor and lessee are each entitled to recover compensation for the damage so sustained by them respectively." The same principle was announced in an earlier case (*Ellis v. Welch*, 6 Mass. 246), and in a later case (*Patterson v. City of Boston*, 20 Pick. 159). In *Foote v. City of Cincinnati*, 11 Ohio, 408, where the leased premises had been appropriated for a street, the supreme court held that the lessee was not released from the payment of rent, but he was entitled to recover from the city for the damages sustained. See, also, following cases, where the same principle is announced: *Workman v. Mifflin*, 30 Penn. St. 362; *Frost v. Earnest*, 4 Whart. 86; *Chicago v. Garrity*, 7 Ill. App. 474. Under the authorities, it seems that a tenant, where a portion of the leased premises are taken under the power of eminent domain for the use of the public, cannot, as against his landlord, claim an eviction, and be released from the payment of rent; and as his liability for the payment of rent continues after a part of his term has been taken by the public, and appropriated to public use, he would be entitled to recover such damages as he sustained by the taking of the leased property by the public. In other words, the lessee takes and holds his term in the same manner as any other owner of real property holds his title, subject to the right of the public to take a part or the whole of it for public use at such time as the public necessity may require, upon the payment of just compensation. In a proceeding to condemn lands for a public purpose, it is not some particular interest which the public seek to take, but the land itself. If A. has one estate in the land, and B. another, in the proceeding to condemn, each are entitled to compensation for the land taken, as his interest may appear in the property; and, as said before, if one has a leasehold interest, he may recover damages for such interest, and still be held liable for the payment of rent, as that liability existed before the leasehold interest was taken for public use. A different rule has been adopted in some states, particularly in Missouri. *Biddle v. Hussman*, 23 Mo. 597; *Barclay v. Picker*, 38 Mo. 143. In those cases it was held that, as to the part of the leased premises appropriated to public use, the rent was extinguished, and no liability existed against the lessee for such rents. But we think the weight of authority is the other way, and we are not disposed to adopt a rule of that character.

It is, however, contended, if the tenant is allowed to recover for the full value of the leasehold interest, and the landlord is compelled to rely upon the personal obligation of the tenant for the payment of rent, a rule of this character would in many cases result in great loss to the landlord. In a proceeding to condemn a part of leased premises, the rule which we have adopted fixes the relative amount of damages to be received by each party interested in the premises; and if a case should arise where, upon the payment of the value of the leasehold, interest to the tenant the remedy of the landlord to collect his rent might be impaired or defeated on account of the insolvency of the tenant, or other cause, a court of equity might interpose to prevent the payment of the damages received into the hands of the tenant, and appropriate the fund, or so much thereof as may be necessary, to the payment of the rents due or to become due from the tenant to the landlord during such time as the lease might by its terms continue to run. What rule should be adopted in case the entire tract or lot of land embraced in a lease should be taken presents a question which does not arise in this record, and it will not be necessary to express an opinion upon it.

It is also claimed that the court erred in granting O'Leary a new trial, and refusing appellant a new trial. This is predicated on the position that the two could not have separate trials, but the court was bound to try the case of O'Leary and appellant as one cause. In a proceeding like this, to condemn lands for a public purpose, while all persons made parties to the petition are usually treated as one defendant, and the interest of all are tried and disposed of in one case, yet cases may arise where the court may award separate trials, as held in *Bowman v. Railway Co.*, 102 Ill. 464. Here the rights and interests of O'Leary and appellant were tried together as one cause; but there were separate verdicts as to each. The verdict in favor of appellant the court thought was right, while the other verdict in favor of O'Leary, the court thought was wrong. Under such circumstances, the court could do nothing but grant a new trial in favor of O'Leary, and refuse it as to appellant. It is also claimed that the verdict was contrary to the evidence. The evidence was conflicting, and it was for the jury to determine, from all the evidence, the amount appellant was entitled to recover. This they did, and, after an ex-

amination of the evidence, we are not prepared to say that the verdict is contrary to the preponderance of the evidence. Some other questions of minor importance in regard to the admission of evidence have been raised, but we perceive no objection to the ruling of the court in this regard. The judgment of the county court will be affirmed.*

Eminent domain — the question of damages as between landlord and tenant.—It is manifest that the value of property cannot be enhanced by any distribution of the title or estate among different persons. The sum of all the parts cannot exceed the whole. *Burt v. Merchants' Ins. Co.*, 109 Mass. 1; *Contant v. Catlin*, 8 Sandf. 485; *Wiggin v. New York*, 9 Paige, 16; *Matter of the New Reservoir*, 1 Sheld. (N. Y.) 408. Where the land taken is subject to a lease the whole sum awarded should be the same as though no lease existed. In apportioning this sum between the landlord and tenant it is necessary to determine the effect of the taking upon the covenant to pay rent. Upon this question there is great diversity of opinion. Some courts hold that the covenant to pay rent remains in force even though the whole property is taken. *Foote v. Cincinnati*, 11 Ohio, 408; *Foltz v. Huntley*, 7 Wend. 210; *Chicago v. Garrity*, 7 Ill. App. 474. Other courts hold that where the whole property is taken the rent is extinguished. *Barday v. Pickler*, 38 Mo. 143; *O'Brien v. Ball*, 119 Mass. 28; *Dyer v. Wightman*, 66 Penn. St. 425; *Taylor Land. & Ten.*, § 519. Where part only of the demised premises is taken the same diversity exists in the authorities. Some hold that the covenant to pay rent is not affected and that there can be no apportionment of the rent. *Parks v. Boston*, 15 Pick. 198; *Patterson v. Boston*, 20 Pick. 159; *Workman v. Miffin*, 30 Penn. St. 362. Others hold directly the reverse. *Biddle v. Hussman*, 23 Mo. 579; *Same v. Same*, 23 Mo. 602; *Kingsland v. Clark*, 24 Mo. 24; *Board of Levee Comrs. v. Johnson*, 66 Miss. 248. See also *Cuthvert v. Kuhn*, 3 Whart. 357; *Voeghtly v. Pittsburgh, etc., R. Co.*, 2 Grant Cas. 243; *Taylor Land. & Ten.*, §§ 386, 519. Sometimes the question is settled by statute. Thus a statute of New York provided that "all leases and other contracts in regard to said lands so taken for said park or park-ways or any part thereof, and all covenants, contracts or agreements between landlord and tenant, or any other contracting parties, shall, upon the confirmation of such report, respectively cease and determine and be absolutely discharged according to law." This statute was applied and held valid in *Matter of the Application of the Mayor, etc., of New York*, 34 Hun, 441, affirmed in 99 N. Y. 569. See, also, *Gillespie v. Thomas*, 15 Wend. 464.

Undoubtedly the conclusion which is practically the most satisfactory, and which can be applied with the least injury to the parties, is that the taking operates to extinguish the obligation to pay rent, in whole or in part, as the case may be. It is a rule of law that if the demised premises are entirely destroyed, the lease is extinguished. *Taylor Land. & Ten.*, § 520, and cases cited. It is also a rule that an eviction by title paramount works an extinguishment or apportionment of the rent, as the case may be. *Taylor Land. &*

* Reported in 26 N. E. Rep'r. 577.

Ten. §§ 877, 878; *Blair v. Claxton*, 18 N. Y. 539; *Fillebrown v. Hoar*, 124 Mass. 580. While the taking of the premises for a public use is not a destruction of land in a literal sense, it is a destruction of the right and title of the parties in and to the land; while it is not an eviction by paramount title, it is an eviction by paramount right. A very slight modification or extension of the rules referred to would be sufficient to make them embrace the case of a taking for public use.

The rule laid down by the court in *Board of Levee Commissioners v. Johnson*, 66 Miss. 248, is as follows: "The whole estate condemned is to be valued and apportioned between the landlord and tenant, giving to the landlord the value of his reversion and the rents reserved during the term, less an abatement for present payment, and to the tenant the value of his term, less the rent charged thereon."

The lessee is entitled to such compensation as will make him whole in respect to his interest in the land, irrespective of any general benefits conferred by the taking. *Renwick v. D. & N. R. Co.*, 49 Iowa, 664; *Matter of Morgan R., etc., Co.*, 32 La. Ann. 371. Any covenants which give value to the lease, such as a covenant for renewal, are to be taken into consideration; also any conditions which might diminish its value. *Matter of William St.*, 19 Wend. 678; *North Penn. R. Co. v. Davis*, 26 Penn. St. 238; *Bourne v. Liverpool*, 33 L. J. (Q. B.) 15; *Penny v. Penny*, L. R., 5 Eq. Cas. 227. The lessee is entitled to the value of buildings put on by him, although the lessor may elect to purchase them at the end of the term. *Matter of Morgan, etc., Co.*, 32 La. Ann. 371; *Livingston v. Sulzer*, 19 Hun, 875; *Muller v. Earle*, 35 N. Y. Sup. Ct. 461. In *Schriber v. Chicago & Evanston R. Co.*, 115 Ill. 840, a petition was filed to condemn certain property, March 1, 1883. The property was subject to a lease which expired December 15, 1883. The buildings on the premises belonged to the tenants. The tenants held to the end of their term and then held over and continued business, paying rent as before. Upon a trial of the case after the latter date, it was held that the tenants could recover nothing; that having held out their term they were deprived of nothing, and that they could not acquire any new interest in the property except subject to the petition for condemnation, and that, as to the buildings, they should have removed them before the term expired. See, also, *Lawrence and Others' Appeal*, 78 Penn. St. 365. One who takes a lease and puts improvements upon the property after the petition to condemn the property is filed can recover no compensation. *Chicago, Evanston & L. S. R. Co. v. Catholic Bishop of Chicago*, 119 Ill. 535. Where the entire damages were assessed and paid to the landlord, it was held that the tenant might recover his equitable proportion, less his ratable portion of the costs of prosecuting the claim, in an action for moneys had and received. *Harris v. Hawes*, 75 Me. 436. But in New York, where part of a leased building was taken and an item of \$500 was allowed to the landlord for putting in a new wall which the tenant was obliged to and did build, it was held that the tenant could not recover the cost from the landlord to the extent of the \$500, and that to allow this would be to impeach the award. *Turner v. Williams*, 10 Wend. 140.

As to the rights of tenants to recover for cost of removing goods, machinery, etc., from the premises taken, and for injury to business, reference is made to the following cases: *Brooks v. Boston*, 19 Pick. 174; *Patterson v. Boston*,

20 Pick. 159; S. C., Pick. 425; *Gets v. Philadelphia & Reading R. Co.*, 105 Penn. St. 547; S. C., second appeal, 113 Penn. St. 214. And, see. *Lewis Em. Dom.*, §§ 487, 488. The following are also cited as touching on the subject: *Burbridge v. New Albany & Salem R. Co.*, 9 Ind. 546; *Blythe v. Pratt*, 63 Miss. 707; *Detmold v. Drake*, 46 N. Y. 318; *Strang v. N. Y. Rubber Co.*, 1 Sweeney, 78; *Frost v. Earnest*, 4 Whart. 86; *Green v. Eales*, 2 A. & E. (N. S.) 225; 42 E. C. L. R. 648; *Wainright v. Ramsden*, 5 M. & W. 603; *Slipper v. Totterham & Hampstead Junct. Ry. Co.*, 36 L. J. Eq. 841; *Queen v. Vaughan*, 38 L. J. (Q. B.) 71; *Regina v. Stone*, L. R., 1 Q. B. 529; *Penny v. Penny*, L. R., 5 Eq. Cas. 237; *In re Kings Leasehold Estates*, L. R., 16 Eq. Cas. 521.

WISCONSIN CENT. R. CO. V. KNEALE.

(Supreme Court of Wisconsin, Feb. 24, 1891.)

1. EMINENT DOMAIN. RIGHT OF RAILROAD COMPANY TO CONDEMN GRAVEL PITS. Under the Revised Statutes of Wisconsin, section 1838, subdivision 4, giving railway companies the power, for the purpose of obtaining gravel or other materials, "to take as much land as may be necessary to the proper construction, operation and security of the road," a company desiring to condemn land for such purpose must show the necessity for taking it; and where the findings by the court on this question are that the directors had declared it to be necessary to take the land; that it adjoins the company's main line at a spur track; that the company intends to take from it gravel to ballast the road, but that the taking would work great damage to the owner, and be injurious to the welfare of the people in the vicinity; that there are other places from which gravel may be obtained; and that the taking would be "unreasonable and oppressive" — the petition to condemn should be denied.

2. WHETHER CONDEMNATION PROCEEDING AN "ACTION" WITHIN STATUTE AS TO COSTS. A proceeding by a railroad company to condemn lands is not an "action" within the meaning of the Revised Statutes of Wisconsin 1878, chapter 129, awarding costs to a party to an "action," and the land-owner, therefore, who successfully resists such proceeding, is not entitled to costs for his expenses in defending it.

A PPEAL from circuit court, St. Croix county, E. B. Bundy, judge.

Howard Morris and *T. H. Gill* for appellant. *Bashford & Disney* and *J. A. Kellogg* for respondent.

TAYLOR, J. This is an appeal from an order of the circuit court of St. Croix county, denying the petition of the railroad company for the condemnation of certain lands situate at Jewett's Mills, in said county, for the purpose of procuring gravel for the

construction and maintenance of the railroad of said company. The respondent, the owner of the lands which the company sought to condemn for such purpose, opposed the application, and sets forth at length his reasons for opposing the same. A trial was had before the court as to the necessity for taking the particular land described in the petition of the company for the purpose above mentioned, and, after hearing the testimony of the respective parties, the court found certain facts, upon which it is adjudged that it was not necessary to take the land in question for the purpose mentioned, and dismissed the petition. The company appeals from the order of the circuit court, and asks this court to reverse such order.

The evidence upon which the findings and judgment are based, is not brought before this court. But the learned counsel for the company contend that upon the petition, the answer of the owner of the lands, and the findings of fact by the court, the company is entitled to take the land in question for the purpose mentioned in its petition. The proceedings of the company are taken under subdivision 4, section 1828, Revised Statutes. The learned counsel for the appellant claim that the necessity for taking the land in question is shown by the petition and findings of the court. It seems to us that upon no other possible theory of the case can the order and judgment of the circuit court be reversed. It is admitted that this court in a similar case, or one which involved the same legal propositions applicable to this case, decided that when the necessity for taking the particular land in question was denied by the owner of the land it was incumbent on the petitioning company to establish such necessity by sufficient evidence. *Railroad Co. v. University*, 52 Wis. 537; 8 N. W. Rep'r, 491. In that case Mr. Justice Cassoday, after referring to the statutes which governed that case, and which governed the case at bar, concluded by saying: "As the land outside of the one hundred feet cannot be condemned until the necessity is established by proof, it conclusively follows that the burden of making the proof is upon the party seeking the condemnation. Such has been the construction given to similar statutes in other states, and it is difficult to see how any one could have thought otherwise;" and cites *Railroad Co. v. Davis*, 43 N. Y. 137; *In re New York Cent. R. Co.*, 66 N. Y.

407. See, also, *Railroad Co. v. University*, 49 Wis. 162; 5 N. W. Rep'r, 331. It does not seem that any other construction can be fairly given to our statute than that which was given to it in the case above cited. The statute, in giving the right, to railroad companies to take lands necessary for their construction and operation, says the company shall have power "to lay out its road not exceeding one hundred feet in width, and to construct the same; *and for the purpose of cuttings and embankments, and of obtaining gravel or other materials, to take as much land as may be necessary to the proper construction, operation and security of the road.*" It is under the part of the section italicized that the company claims the right to take the land in the case at bar. Under the provisions of the statute above quoted this court in the case of *Railroad Co. v. University*, supra, has held that the right of the company to locate its road according to its own judgment, and to take one hundred feet in width for its right of way, is a matter in the discretion of the company; but that, as to all the other lands to be taken, the necessity for taking the same must be alleged in the petition, and when denied it must be established by the evidence. This construction is strengthened and confirmed—if it needs strengthening or confirmation—by the provisions of sections 1845–1847, Revised Statutes, which direct and regulate the proceedings which the railroad company must take in order to acquire the lands necessary for the construction and operation of its road. In section 1846 it is provided, among other things, "that if such real estate is desired for the main line of the railroad, or in parts for the main line and in part for station or building grounds, yards or other purposes, said petition shall state that such corporation is duly incorporated; that it is its intention in good faith to construct the road authorized by its charter; that it has surveyed the route over the lands sought to be acquired for its main line, and has actually staked out the center line of its proposed road over the grounds desired for such main line [describing the lands across which such main line runs], and, in case a greater width than one hundred feet shall be desired to be taken across any track, it shall specify the width desired across said track, and the reasons therefor, and shall contain a description of the land sought to be acquired for depot, station or building grounds, and the other purposes of such corporation," etc. This petition is to

be filed in the office of the clerk of the circuit court of the county where the lands sought to be taken are situated; and the section declares that the filing of such petition shall be the commencement of a suit in said court. The section then provides for giving parties interested notice of a hearing upon such petition, and authorizes any party interested in the lands to be taken to show cause against granting the prayer of the petition, and then provides "*that the court or judge shall hear the parties interested, and may adjourn from time to time, as shall be convenient; and shall determine whether the railroad corporation is entitled to take the whole or any part of the lands sought to be acquired, and if no sufficient cause is shown against granting the prayer of the petition, shall make an order,*" etc. The part of the statute above italicized clearly confers upon the judge or court judicial power to determine the right of the corporation to take the lands asked for, as well as the necessity for taking the same when asked to be taken for any other purpose than for its right of way—not exceeding one hundred feet in width. If, as the contention is on the part of the appellant company, the right to take the real estate desired and the necessity for taking it is to be determined by the company itself, it seems to us the legislature would have used different language from that found in the statute.

In the case at bar the only findings of the court upon the question of the necessity for taking the lands are the third, fourth and fifth findings, which read as follows: "(3) That the board of directors of said corporation, before the filing of the petition, by resolution declared it to be necessary to take the land and premises in question for the purpose of obtaining gravel and other materials to be used in the operation and construction of said road, and that it was the intention of the company in good faith to use the land for such purpose. (4) That the land sought to be condemned lies along the south side of a strip of land already owned by the petitioner, and used as a side track or spur track to a certain mill, and only adjoins the right of way of petitioner's main line at the south-westerly end, at the junction of such spur track with said main track, and it is outside of the one hundred feet of right of way of petitioner's main line. (5) That the petitioners intend to use the gravel and materials taken from the land in question for the purpose of ballasting their main line from Cy-

lon, St. Croix county, Wisconsin, to St. Croix river, a distance of about twenty-four miles; and that said petitioners need suitable material for ballast for that part of the said main line." All the other findings of fact tend to show that there is no necessity for taking the particular land in question for the purposes of gravel for the use of the road; that the taking would work a great and unnecessary damage to the property of the owner of the lands taken; that it would also be injurious to the general welfare of the people in its vicinity; and that there were other places for obtaining the gravel needed, on the line of its road in the immediate vicinity, and where the taking of land for that purpose would not be injurious to the public welfare, or peculiarly injurious to the owners. The ninth finding of fact suggests at least a reason why the company seems anxious to take this land in preference to any other place on its line in that vicinity, and which might properly have weight with the court in refusing this application. It is suggested by counsel that the court has not found that there was no necessity for taking the land in question, and for a failure to so find it became the duty of the court to appoint the commissioners as required by the statute. We think the conclusion which the court comes to on all the evidence is equivalent to an express finding that it is unnecessary to taken the land in question for the purposes required. The court makes his conclusion of law, after stating his findings of fact, as follows: "As a conclusion of law from the above facts I find that the taking of the land in question for the purpose of obtaining material for ballast would not be a reasonable exercise of the power of condemnation given to railway companies, but would be unreasonable and oppressive." This we think is sufficient to justify the court in dismissing the petition. To justify the court in granting the petition and appointing commissioners it was necessary that it should find that it was necessary to take the land in question. That is not found by the court, nor do the facts found show such necessity. The court was not authorized, therefore, to make any order except the one it did, dismissing the petition. This decision is not in conflict with the decision of this court in *Ford v. Railroad Co.*, 14 Wis. 609. In that case the land required was for a right of way, and not for any other purpose.

The learned counsel for the appellant insist that it was error

on the part of the court to award costs to the respondent for his expenses of defending against the petition of the company. It would seem reasonable that the respondent should be compensated to some extent for his trouble and expenses in defending against the claim of the company, but the right to recover costs in any action or proceeding is a statutory right, and not a common-law right. See *In re Carroll's Will*, 53 Wis. 228; 10 N. W. Rep'r, 375; *Potts v. Cooley*, 56 Wis. 49; 13 N. W. Rep'r, 682; *Baker v. State*, 69 Wis. 42; 33 N. W. Rep'r, 52. If, therefore, the statutes in regard to costs do not apply to a case of this kind, the court had no power to award them to the respondent. There is nothing in the act which regulates these proceedings which awards costs to the successful party, or to either party. The only other general statute declaring when costs may be awarded to a party is chapter 129, Revised Statutes of 1878. This chapter only awards costs to a party to an action. Is the proceeding by the railroad company to condemn lands for its use an action within the meaning of said chapter? This question has been answered by this court in the negative. *Cornish v. Railroad Co.*, 60 Wis. 476; 19 N. W. Rep'r, 443; *Railroad Co. v. University*, 49 Wis. 162; 5 N. W. Rep'r, 331; *Railroad Co. v. Strange*, 63 Wis. 182; 23 N. W. Rep'r, 432. These cases hold that a proceeding to condemn land by a railroad company is a special proceeding, and not an action, within the meaning of our laws in regard to actions and costs in such actions. We find no statute which authorizes the awarding of costs in special proceedings, unless it be in cases when such special proceedings are auxiliary to, or in some way connected with, an action at law or in equity, such as attachment, replevin proceedings, garnishment or supplementary proceedings, or unless the statute giving the special proceeding authorizes the awarding of costs. The statute having omitted to provide for awarding costs in a proceeding of this kind, the court has no right to award them. That part of the order of the circuit court appealed from, awarding costs to the respondent, is reversed; and that part of the said order dismissing the petition of the company is affirmed. The appellant will pay the costs in this court.*

Eminent domain — condemning property for railroad appurtenances.—
Under Laws Iowa, 1884, chapter 190, section 1, authorizing railroad companies

* Reported in 48 N. W. Rep'r, 248; 79 Wis. 89.

owning a completed road to condemn lands "for necessary additional depot grounds," upon procuring a prescribed certificate from the railroad commissioners, such commissioners have authority to grant a certificate for the condemnation of land for depot purposes at a place where the railroad company has no depot, and owns no land other than the right of way on which its road is built." *Sager v. Dey*, 80 Iowa, 23; 45 N. W. Rep'r, 391. Act Mississippi, December 16, 1836, incorporating a railroad company, conferred (section 4) authority to enter upon lands through which it should deem it necessary to make its "railroad," and (section 5), in case of failure to agree with the owner of land as to the price to be paid him, to have the damages by reason of making "said road" assessed; and declared that the company should be invested with the right to "occupy and use such lands for the purposes of said railroad." Held, that the company was not limited to the right to take only enough land for a road-bed, but could acquire enough for station grounds, side tracks, etc. *Ewing v. Alabama & V. R. Co.*, 68 Miss. 551; 9 So. Rep'r, 295. See, generally, *Lewis Em. Dom.*, § 170.

KINGMAN ET AL. V. CITY OF BROCKTON ET AL.

(Supreme Judicial Court of Massachusetts, Feb. 24, 1891.)

1. MUNICIPAL CORPORATION. POWER TO ERECT A BUILDING TO BE USED IN PART BY A GRAND ARMY POST. A city has no power to appropriate public money for the erection of a building to be used in part by a certain Grand Army post during its existence as an organization, since that is not a public use.

A PPEAL from supreme judicial court, Plymouth county, Oliver W. Holmes, Jr., judge.

Petition by ten tax-payers of the city of Brockton for an injunction to restrain the city treasurer from issuing any bonds, notes or scrip, and the city council of said city from appropriating or paying from the treasury of said city any money whatever, either under the provisions of an act of the legislature or under an order of said city council appropriating \$40,000 for a memorial hall and public library building in said Brockton. The petition was dismissed at the hearing, and petitioners appeal.

White & Goddard for petitioners. *H. Kingman* for defendants.

C. ALLEN, J. The counsel for the petitioners do not controvert the constitutionality of the statute itself (St. 1890, chap. 432), under which the city council has assumed to act. That

statute authorizes the city to appropriate a sum of money for the erection of a memorial hall, to be used and maintained as a memorial to the soldiers and sailors of the war of the Rebellion. This may properly be deemed to be a public purpose, and a statute authorizing the raising of money by taxation for the erection of such a memorial hall may be vindicated on the same grounds as statutes authorizing the raising of money for monuments, statues, gates or archways, celebrations, the publication of town histories, parks, roads leading to points of fine natural scenery, decorations upon public buildings, or other public ornaments or embellishments, designed merely to promote the general welfare, either by providing for fresh air or recreation, or by educating the public taste, or by inspiring sentiments of patriotism, or of respect for the memory of worthy individuals. The reasonable use of public money for such purposes has been sanctioned by several different statutes, and the constitutional right of the legislature to pass such statutes rests on sound principles. Pub. St., chap. 27, §§ 10, 11; St. 1882, chaps. 154, 255, § 5; St. 1883, chap. 119; St. 1884, chap. 42; St. 1886, chap. 76; St. 1889, chap. 21; *Higginson v. Nahant*, 11 Allen, 530. Assuming to act under the authority of the statute of 1890, chapter 432, the city council of Brockton proceeded to pass an order appropriating \$40,000 for the purpose of erecting a "memorial hall and public library building, * * * a portion of said building to be for the use of Fletcher Webster Post, G. A. R., No. 13, so long as it shall exist as an organization; * * * the said plans [of the building] to be approved by the trustees of the said G. A. R. Post." By this vote a portion of the contemplated building is to be devoted to the use of the said Grand Army post during its existence as an organization, and the plans are to be approved by the trustees of said post. The defendant contends that this vote is within the authority of the statute. This is certainly open to doubt, but, assuming it to be so, the question presented for determination is whether the purpose thus expressed is a public purpose, for which money can be raised by a town by taxation, even with legislative sanction. It might, perhaps, be sufficient to declare, as the petitioners contend, that the statute is not broad enough to cover the vote of the city council, and that the real question to be determined is merely whether money can be lawfully raised by the city for the purpose

expressed, in the absence of any statute expressly authorizing it; but it is better to meet the broader question, whether the legislature can authorize a city or town to make such a use of public money, and, in the opinion of the majority of the court, it cannot. The general rule is well established and is illustrated by a great variety of decided cases, that taxation must be limited to public purposes. It was accordingly held in the recent case of *Mead v. Acton*, 139 Mass. 341; 1 N. E. Rep'r, 413, that a statute authorizing a town to pay bounties to soldiers who re-enlisted in 1864, and were credited to the town, was unconstitutional, the purpose being to benefit individuals, and not the public. The Fletcher Webster Post, G. A. R., No. 13, is not a public body, but it is an association of individuals. To support and maintain such an association cannot be deemed to be a public purpose. If a city or town may be authorized to erect a building to be devoted in part to the use of such an association so long as it shall exist as an organization, it is not easy to see why it may not be authorized to erect one exclusively for that purpose, and to provide the necessary furniture, and indeed to bear all the expenses of maintaining the association. If a city or town may be authorized to give such assistance to a body of persons who have been soldiers or sailors in the war, the same principle would seem to extend so far as to include those who have rendered other great and meritorious services, and thus are entitled to public gratitude; such, for example, as societies of disabled or past firemen or policemen. If once the principle is adopted that a city or town may be authorized to raise money by taxation for conferring benefits on individuals merely because in the past they have rendered important and valuable services for the benefit of the general public, occasions will not be wanting which will appeal strongly to the popular sense of gratitude or to the popular emotion, and the interests of just rights of minorities will be in danger of being disregarded. If the body of persons to be benefited is numerous, the greater is the influence that may probably be brought to bear to secure such an appropriation of the public money. Under such circumstances, it is necessary to recur and to adhere firmly to fundamental principles. The right of taxation by a city or town extends only to raising money for public purpose and use. There is no definition of public purpose or use which can include the maintenance and support of a Grand

Army post. It is said that if a city has a public building already erected which is larger than its present needs for municipal purposes require, it may allow portions of such building to be used for other purposes for the time being, either for a stipulated rent or price, or gratuitously; and, further, that in erecting a public building a city need not limit the size of it to actual existing needs, but may make a reasonable provision for probable future wants. All this, within proper limits, is true. *Worden v. New Bedford*, 131 Mass. 23; *French v. Quincy*, 3 Allen, 9; *Spaulding v. Lowell*, 23 Pick. 71. But there may be some danger of extending this doctrine too far. Should a question arise whether a contemplated building exceeded what was allowable with reference to legitimate prospective needs, such a question would have to be determined on its own merits; and the good faith of the transaction and the soundness of the judgment shown in providing for future wants might have to be considered. No such question has arisen heretofore, or arises now. In the present case it is proposed to erect a building with the express purpose of devoting a portion of it to the use of the G. A. R. post, not temporarily, but as long as that organization may exist. The statute of 1885, chapter 60, is referred to, which authorizes any city or town to lease, for a period not exceeding five years, to any post of the Grand Army of the Republic established in such city or town, to be used by such post solely for the purposes of its organization, any public building, or part thereof, except school-houses in actual use as such, on such terms as the board of aldermen or the selectmen may determine. Without now considering whether in any respect this statute goes too far or is liable to abuse, it is sufficient to say that it refers only to existing public buildings, and by no means authorizes the erection of a building, to be let to a Grand Army post at a nominal rent. In addition to *Mead v. Acton*, 139 Mass. 341; 1 N. E. Rep'r, 413, and cases there cited, the following, among others, may also be referred to as tending to support the views above expressed, in respect to the proper limits of the right of taxation. *Jenkins v. Andover*, 103 Mass. 94; *Loan Assn. v. Topeka*, 20 Wall. 655; *Parkersburg v. Brown*, 106 U. S. 487; 1 Sup. Ct. Rep'r, 442; *Osborne v. Adams Co.*, 106 U. S. 181; 1 Sup. Ct. Rep'r, 168, and 109 U. S. 1; 3 Sup. Ct. Rep'r, 150; *Ottawa v. City of Carey*, 108 U. S. 110; 2

Sup. Ct. Rep'r, 361; Cole v. City of La Grange, 113 U. S. 1; 5 Sup. Ct. Rep'r, 416; Association v. Wood, 39 Penn. St. 73; State v. Osawkee Tp., 14 Kans. 418, an instructive judgment by Brewer, J.; Mather v. City of Ottawa, 114 Ill. 659; 3 N. E. Rep'r, 216; Feldman v. City Council, 23 S. C. 57; Coates v. Campbell, 37 Minn. 498; 35 N. W. Rep'r, 366; State v. Tappan, 29 Wis. 664; Brick Co. v. Brewer, 62 Me. 62. See, also, Dill. Mun. Corp., §§ 159, 508, 736; Cooley Tax'n. chap. 4. Decree for plaintiffs.*

Municipal corporation — taxation — public purpose.— Most of the leading cases as to what constitutes a public purpose for which the power of taxation may be exercised are referred to in the foregoing opinion. The case presents an instance in which a public and private purpose were so blended together that the two could not be separated. Therefore, the whole scheme was *ultra vires*. The case is analogous to an attempt to condemn property under the power of eminent domain for uses which are partly public and partly private. In such case the whole proceeding is void. Attorney-General v. Eau Claire, 37 Wis. 400; Sadler v. Langham, 84 Ala. 311; Harding v. Goodlet, 3 Yerg. 41; Chicago & N. W. Ry. Co. v. Galt, 1 Am. R. R. & Corp. Rep. 365. And, see, In re Barre Water Co., 3 Am. R. R. & Corp. Rep. 136.

IN RE ARGUS PRINTING CO.

(Supreme Court of North Dakota, Feb. 23, 1891.)

1. STOCK AND STOCKHOLDERS. RIGHT OF PLEDGEE TO VOTE STOCK. The pledgee of stock in whose name it stands on the corporate records has a right to vote the stock at a meeting to elect directors.

2. The pledgeor has no right to vote such stock, but a court of equity will, in a proper case, compel the pledgee to give the pledgeor a proxy.

3. QUALIFICATIONS OF DIRECTORS. One not appearing to be a stockholder upon the corporate records is not eligible to the office of director, under the statute providing that only stockholders are eligible to that office; one who still so appears is eligible, and may vote notwithstanding he has assigned the stock.

4. ELECTION. MAJORITY NECESSARY FOR A CHOICE. A vote of stockholders representing a majority of the subscribed capital stock is necessary to the choice of a director. There being no such vote, the election is declared illegal, and a new election ordered.

5. SEPARATE MEETINGS BY DIFFERENT FACTIONS. VALIDITY OF ELECTION. A stockholder holding a majority of the subscribed capital stock having acquiesced in the organization of a stockholders' meeting, and having participated

* Reported in 26 N. E. Rep'r, 938; 153 Mass. 255.

in the business of the meeting as so organized, among other things having nominated persons for the office of director, cannot afterward withdraw from the meeting, and organize another meeting, at the same time and in the same place, and by voting at that meeting elect the persons voted for by him the directors of the corporation. It is his duty to remain in the meeting first organized, and vote his stock there, and no one can prevent his voting his stock at that meeting, although his ballot may be rejected. Notwithstanding such rejection, had he voted his stock at the original meeting the persons voted for by him would have been elected directors, and under the statute declared by the court elected.

6. RIGHT OF HOLDER OF LEGAL TITLE TO VOTE STOCK. A transferee of stock upon the corporate records is qualified to vote the stock, and to become a director, although the transfer was made for the express and sole purpose of so qualifying him, provided that it was not made in furtherance of a fraudulent scheme.

APPEAL from district court, Cass county.

A. C. Davis, B. F. Spaulding and Benton & Amidon for appellant. *S. G. Roberts and A. W. Edwards* for respondent.

CORLISS, C. J. On this appeal we are asked to review the judgment of the district court in summary proceedings instituted under section 2932 of the Compiled Laws to determine the rights of certain persons to the offices of directors of the Argus Printing Company, a corporation. This statute provides that upon the application of any person or body corporate aggrieved by any election held by any corporate body, or any proceedings thereof, the district judge of the district in which the election is held must proceed forthwith summarily to hear the allegations and proofs of the parties, or otherwise inquire into the matters of complaint, and thereupon confirm the election, order a new one, or direct such other relief in the premises as accords with right and justice. This appeal must be decided as we determine which of two persons had the right to vote five hundred and forty-six shares of stock. The total amount of stock which had been issued at the time of the meeting to elect directors was five hundred and seventy shares. At this meeting A. W. Edwards voted these five hundred and forty-six shares of stock for the following directors: A. W. Edwards, H. C. Plumley, N. R. Flint, Alexander Griggs and William A. Stevens. At the same time and place one E. O. Faulkner voted these same shares for Alexander Griggs, W. A. Stevens, B. F. Spaulding, H. C. Plumley and E. O. Faulkner as

directors. In whom was the right to vote this stock? The stock at one time was the property of A. W. Edwards. For the purpose of securing a debt which he owed to J. J. Hill, this stock, with ten other shares, was transferred upon the corporate books to E. O. Faulkner, confidential clerk of Mr. Hill. Certificates representing the total number of shares, five hundred and fifty-six, were issued directly to Mr. Faulkner, the same being signed by Mr. Edwards as president of the company, the old certificates held by Edwards being canceled. The stock, therefore, stood on the books of the corporation in the name of E. O. Faulkner. Where there has been no transfer of the stock on the books of the corporation a pledgee of such stock may not vote it. The beneficial ownership is still in the pledgeor, and the records of the corporation still show him to be a stockholder. In none of the cases cited in which the right to vote was adjudged to be in the pledgeor, instead of the pledgee, had there been a record of the transfer made. See *McDaniels v. Manufacturing Co.*, 22 Vt. 274; *In re Baker*, 6 Wend. 509; *Ex parte Willcocks*, 7 Cow. 410; *Strong v. Smith*, 15 Hun, 222. We have discovered an Oregon case in which the stock stood upon the books in the name of the pledgee, but the court ruled that he could not vote it because he had no authority from the pledgeor to make the transfer. This case we will refer to hereafter. In the case at bar the stock stood in the name of the representative of the pledgee upon the corporate records. Was he a *bona fide* stockholder within the meaning of our statute which restricts the right to vote stock to those who are *bona fide* holders thereof? Comp. Laws, § 2931. It may be stated in this connection that Edwards could not vote the stock, as the stock had not stood in his name on the books of the corporation for ten days prior to the election. *Id.* If, then, the representative of the pledgee could not vote the shares, no election of directors could be held, for no one else had a right to vote it, and without its being represented at the election no election of directors could be had, for the reason that these shares constituted more than half of the capital stock. At all elections or votes had for any purpose, there must be a majority of the subscribed capital stock represented, etc. *Id.* No person can be chosen director without a majority vote. *Id.*, § 2925. At the time the legislature employed the word "stockholders" in the section pre-

scribing the qualification of a voter at corporate meetings, that word had acquired a definite and fixed meaning, so far as a pledgee of stock was concerned. It had been repeatedly adjudged that a pledgee of stock whose transfer was upon the corporate records was a "stockholder," within the meaning of the statute providing for the liability of stockholders for the debts of corporations. The general reasoning upon which these decisions were based was that the pledgee with a recorded transfer was a stockholder for the purpose of receiving dividends and voting at stockholders' meetings; and that he could not enjoy all of the benefits enjoyed by a stockholder without being subjected to a stockholder's liability. Said the court in *Bank v. Case*, 99 U. S. 628: "It is thoroughly established that one to whom stock has been transferred in pledge, or as collateral security for money loaned, and who appears on the books of the corporation as the owner of the stock, is liable as a stockholder for the benefit of creditors. We so held in *Pullman v. Upton*, 96 U. S. 328, and like decisions abound in the English courts, and in numerous American cases, to some of which we refer. *Adderly v. Storm*, 6 Hill, 624; *Rosevelt v. Brown*, 11 N. Y. 148; *Bank v. Burnham*, 11 Cush. 183; *Magruder v. Colston*, 44 Md. 349; *Crease v. Babcock*, 10 Metc. (Mass.) 535; *Wheelock v. Kost*, 77 Ill. 296; *In re Bank*, 18 N. Y. 199; *Hale v. Walker*, 31 Iowa, 344. For this several reasons are given. One is that he is estopped from denying his liability by voluntarily holding himself out to the public as the owner of the stock, and his denial of ownership is inconsistent with the representation he has made; another is that by taking the legal title he has released the former owner; and a third is that, after having taken the apparent ownership, and thus become entitled to receive dividends, vote at elections, and enjoy all the privileges of ownership, it would be inequitable to allow him to refuse the responsibilities of a stockholder."

In *Pullman v. Upton*, 96 U. S. 328, the court said: "So in *Bank v. Burnham*, 11 Cush. 183, it was decided that a transfer of stock on the books of the bank, intended merely to be held as collateral security, makes the holder liable for the bank debts. It was said that the creditor was to be considered the absolute owner, and that his arrangement with his debtor cannot change the character of the ownership." In *Magruder v. Colston*, 44

Md. 349, where it was held that the pledgee whose transfer was recorded was liable as a stockholder, the court said: "Stockholders are those who appear on the books of the bank as owners of shares, and who are entitled to manage its affairs, and they can only throw off the liabilities incident to that relation by transferring the stock."

That the word "stockholder," as used by the legislature, was, in the absence of any qualification of its meaning, understood by the legislature to be sufficient to embrace a pledgee with a legal title to the stock because of a transfer on the books, is clear from the provisions of section 2933, Compiled Laws, expressly declaring that the holding of stock by a pledgee shall not render the holder a stockholder, within the meaning of that section, rendering stockholders liable for debts of the corporation. It is significant that in section 2931, prescribing the qualification of a voter, and declaring that he must be a *bona fide* stockholder, no such limitation of the meaning of the word "stockholder" is to be found. There are numerous cases in which it is said that a pledgee is a stockholder, and entitled to vote when he appears to be a stockholder on the books of the corporation. In *Franklin Bank v. Commercial Bank*, 36 Ohio St. 350, plaintiff loaned to one Foote, the president of defendant, a sum of money, and received as security a pledge of the capital stock of defendant owned by such president. Defendant having refused to transfer the shares on its books, plaintiff sued for the conversion of the stock. The court held that he could not recover, on the principle that one corporation will not be allowed to own stock in another corporation in the absence of statutory authority. Said the court: "Were this not so, one corporation, by buying up the majority of the shares of the stock of another, could take the entire management of its business, however foreign such business might be to that which the corporation so purchasing such shares was created to carry on. * * * Nor would this result follow any the less certainly, if the share of stock were received in pledge only to secure the payment of a debt, provided the shares were transferred on the books of the company to the name of the pledgee. A person in whose name the stock of the corporation stands on the books of the corporation is as to the corporation a stockholder, and has the right to vote upon the stock. * * *

Hence if the plaintiff appeared upon the books of the defendant as the transferee or owner of the two hundred shares of stock represented by the certificate to Foote, it would have the right to vote upon the stock at all meetings of the stockholders of the defendant; and it would be only necessary for it to procure in pledge, as security for money loaned, a majority of the shares of the capital stock of the Commercial Bank [defendant in the case] in order to obtain full control of its affairs and take charge of its banking operations. * * * It, therefore, follows that the refusal of the defendant to permit the transfer upon its books to the plaintiff of the two hundred shares of its stock violated no right of the plaintiff, and consequently created no liability on the part of the defendant. Such refusal did not amount to a conversion of the stock. Its action in refusing to transfer was but the denial of any right by the plaintiff to be placed in a position to interfere and participate in the control and management of its internal affairs." In *Poole v. Association*, 30 Fed. Rep'r, 513, Judge Brewer says: "The stock was assigned as collateral for moneys advanced by B. D. Brown. It was duly transferred on the books of the company, so that they unquestionably have all the rights of stockholders." In *State v. Ferris*, 42 Conn. 560, a bankrupt in whose name stock stood on the books of the company was adjudged entitled to the right to vote the stock after the title to the stock had passed to the assignee in bankruptcy under the provisions of the bankrupt act. The court observed: "It has been repeatedly held by this court that the books and records of a corporation determine who are its stockholders for the time being, and who have the right to vote on the stock, although the same may have been sold or pledged as collateral security. In such cases the party who appears to be the owner by the books of the corporation has the right to be treated as a stockholder, and to vote whatever stock stands in his name." See, also, *People v. Robinson*, 64 Cal. 373; 1 Pac. Rep'r, 156; *State v. Pettineli*, 10 Nev. 141. Mr. Colebrooke, in his work on Collateral Securities, says: "In the absence of restrictive statutes, the pledgee of certificates of stock indorsed and transferred on the books of the company has a right to vote at its meetings. His name appearing as stockholder on the records, he becomes for all purposes a stockholder. The right to vote is an incident of the pledge, and

according to the presumed intention of the parties." Section 283. In *Vail v. Hamilton*, 85 N. Y. 453, the action was brought to set aside a mortgage on corporate property, on the ground that it was void because two-thirds of the stockholders had not assented to it. Certain of the stock stood in the name of the pledgee on the books of the corporation. The assent of such stock was essential to the validity of the mortgage. The pledgee did not give such assent, and the court adjudged the mortgage void on the ground, among others, that the pledgee was, as to that particular stock, a stockholder, and his assent was necessary because without it there was not the assent of the requisite two-thirds.

The court said: "It is true that the shares were transferred to Conklin as collateral security, but the certificate was absolute in its terms, and he was described therein as owner. He so appeared upon the proper books of the corporation. Under such a title, he had power to render the security available by sale to satisfy the debt on default of payment, and until the debt was satisfied he was the one interested in protecting the property represented by the shares from diversion by liens or preferences improperly created. The company had a right of redemption, and so had an equitable interest in the stock; but upon defendant's theory they could, without redemption, overreach the legal title by creating a mortgage which, when enforced, would extinguish it, and until that event deprive it of value. Conklin had a clear interest in that matter. Except as limited by statute, no stockholder by any title could have more or greater rights, or be subjected to other liabilities. He is relieved by statute from personal liability." This, as we have already seen, is the case in this state. "He would be otherwise bound for the debts of the corporation, for a creditor need in general look only for the legal title. For the same reason he had a right to vote; his character upon the books of the bank would be conclusive upon the inspectors; and whether section 17 of the act of 1848, *supra*, could, under any circumstances, be so construed as to deprive one with such a title from voting, it is not necessary to inquire, for the question does not arise; but it is clear that, except for the permission given in that section, even a pledgee could not vote. It has no application to an assent required to be given in writing to a specific act of the corporation, and which, without qualification, the statute requires to be

given by a stockholder. Such we have no doubt was the character of Conklin as to the five hundred shares in question at the time of the execution of the mortgage. Including these shares as part of the stock to be represented, the assent required by statute was not given, and the mortgage is of no validity." In *Hoppin v. Buffum*, 9 R. I. 513, the court said: "The object of the stock-book, and of requiring transfers of stock to be recorded by the corporation, is for the protection of the corporation, to enable it to know who are its members, who are entitled to dividends, and for no purpose is it more important than to enable it to know who are entitled to vote in case of an election." The language of the court in *Re Steamboat Co.*, 44 N. J. Law, 529, is equally emphatic on the proposition that the record determines the question who are stockholders in their dealings with the corporation, which embrace the payment and receipt of dividends, and the voting at stockholders' meeting for directors and for other purposes; although on application to a court of equity the stockholder might be compelled to give a proxy to another or to vote as such other should direct. Said the court: "The general rule is that the books of the corporation are the evidence of the persons who are entitled to the rights and privileges of stockholders in the management of the affairs of the corporation.

"With the single exception that stock really belonging to the corporation cannot, at any election for its directors, be voted upon, directly or indirectly [citing cases], the books of the corporation are the only evidence of who of the stockholders, and, as such, are entitled to vote at elections. *Downing v. Potts*, 23 N. J. Law, 66. Neither the inspectors nor stockholders can dispute the right to vote of any one who appears by the company's books to be the holder of stock legally issued. In *Pender v. Lushington*, 6 Ch. Div. 70, the articles of association provided that every member should be entitled to one vote for every ten shares, but should not be entitled to more than one hundred votes in all, and that no member should vote at any general meeting unless he had been possessed of his shares for three months previously thereto. It was held that the register of stockholders was the only evidence by which the right to vote could be ascertained, and that no vote of shareholders appearing on the register, and properly qualified, should be rejected on the ground that their shares had

been transferred to them by other shareholders, for the purpose of increasing their own voting power, or with an object alleged to be adverse to the interests of the company, or on the ground that the holders were not beneficial owners of the stock. So, also, it is held that a person has a right to vote on stock standing in his own name as trustee for another, or on stock which he has pledged or hypothecated, if it be in his own name on the company's books; and that inspectors of the election, in determining the qualifications of voters, have no authority to inquire whether the stockholder who appears by the books to be a stockholder is or not the real owner of the stock standing in his name. They must take the company's books as conclusive evidence of the qualification to vote." To same effect are *Coleb. Coll. Sec.*, § 282; 1 *Mor. Priv. Corp.*, §§ 170, 483; *Burgess v. Seligman*, 107 U. S. 20-29; 2 *Sup. Ct. Rep'r*, 10. In *State v. Smith (Ore.)*, 14 *Pac. Rep'r*, 814 (on rehearing, 15 *Pac. Rep'r*, 386), it was held that the pledgee, who had secured a transfer to himself of the stock on the books of the corporation under the authority of the express language of the assignment of the stock, empowering the pledgee to transfer the stock to his own name on the books, was, nevertheless, not entitled to vote the stock. But the reason for the decision has no application in this jurisdiction. The court held that the power to make the transfer on the books, although unlimited, although without condition as to the time when it might be exercised, could not lawfully be exerted until the pledgee had destroyed the equity of the pledgeor by foreclosure. This decision is clearly opposed to that of the court in *Nicollet Nat. Bank v. City Bank (Minn.)*, 35 *N. W. Rep'r*, 577, where the court affirmed a judgment against the defendant for conversion of stock, because it had refused to transfer the same upon its corporate books to the name of a pledgee thereof before foreclosure of the pledge, and while still a mere pledgee. This case recognizes the absolute right of the pledgee to such a transfer.

Said the court: "Although the assignment to the plaintiff was for the purpose of collateral security, the plaintiff was entitled to have the same entered on the books of the bank." To same effect, *Dayton Nat. Bank v. Merchants' Nat. Bank*, 37 *Ohio St.* 215. The right of the pledgee to insist upon a transfer upon the books at once is recognized by numerous cases. *Rich v. Boyce*, 39 *Md.*

314; *Hubbell v. Drexel*, 11 Fed. Rep'r, 115-118; *Coleb. Coll. Sec.*, § 272; and dissenting opinion of Lord, C. J., in *State v. Smith (Ore.)*, 15 Pac. Rep'r, 137, which accords with our views.

But our statute settles the question. It in express terms declares that a transfer of stock shall not be valid except between the parties, unless the transfer is entered upon the corporate books. *Comp. Laws*, § 2915. Under such a statute, the condition of a pledgee with an unrecorded transfer would be similar to that of a mortgagee whose real or chattel mortgage should not be recorded or filed. Nay, his situation would be worse. A mortgagee's lien in such a case cannot be defeated by the levy of an attachment without notice. But a creditor of a pledgeor of stock, who attaches the same in ignorance of a transfer thereof, no transfer on the books having been made, secures a lien which is superior to the interest of the pledgee, and his paramount lien cannot be defeated by subsequent notice of the transfer. In *re Murphy*, 51 Wis. 519; 8 N. W. Rep'r, 419; *Fiske v. Carr*, 20 Me. 301; *Skowhegan v. Cutler*, 49 Me. 315; *Naglee v. Wharf Co.*, 20 Cal. 529; *Weston v. Mining Co.*, 5 Cal. 186; *Strout v. Mining Co.*, 9 Cal. 78; *Fisher v. Bank*, 5 Gray, 373; *Sabin v. Bank*, 21 Vt. 353; *Cheever v. Myers*, 52 Vt. 66; *Bank v. Gridley*, 21 Ill. 457; *Northrop v. Turnpike Co.*, 3 Conn. 549; *Pinkerton v. Railroad Co.*, 42 N. H. 462; *Ft. Madison Lumber Co. v. Batavian Bank (Iowa)*, 32 N. W. Rep'r, 336; *Colt v. Ives*, 31 Conn. 25; *Sibley v. Bank*, 133 Mass. 515; *Bank v. Williston*, 138 Mass. 244; *People v. Robinson (Cal.)*, 1 Pac. Rep'r, 156. To say, in the light of this statute and its construction, that a power vested in the pledgee to record the transfer was intended by the pledgeor not for the purpose of conferring on the pledgee power to protect himself while a pledgee by making such record, is downright nonsense. Said the court in *Rich v. Boyce*, 39 Md. 314: "So far from the transfer of stock to the appellee's own name being a wrongful conversion, it was the exercise of an undoubted right conferred upon him by the appellant. Without such right the pledge would have been doubtful security, as the stock would have been liable to execution or attachment by any creditor of the appellant." To same effect, *Coleb. Coll. Sec.*, § 288. But where the pledgeor not only authorizes a record of the transfer to be made by the pledgee, such record being essential to the latter's

protection, but makes the transfer on the books himself, as in the case at bar, by surrendering his old certificates and issuing directly to the pledgee new certificates, signed by the pledgeor himself as president of the corporation, no room is left for the inquiry whether the pledgee had authority to make the transfer upon the corporate books, as in the Oregon case. In *Day v. Holmes*, 103 Mass. 310, the court held that a pledgee was justified in procuring new certificates to be issued to himself in place of stock assigned to him in blank, and that this act did not constitute a conversion of the stock. See, also, *Coleb. Coll. Sec.*, §§ 288, 323.

The provisions of the statute that a stockholder, to be entitled to vote, must be a *bona fide* stockholder, and have stock in his own name on the books, at least ten days prior to the election, must be read and interpreted in the light, not only of the decisions holding that a pledgee is a stockholder, but also in connection with the legislation which, under the decisions and by its terms, makes it necessary for a pledgee to secure a transfer on the books to protect himself against the creditors of his pledgeor. Knowing that stock is frequently pledged, and that the pledgee would secure a transfer on the books to protect himself, it must be assumed that the legislature intended he should be regarded as a stockholder with power to vote, for it has disqualified his pledgeor to vote the stock after transfer; and it would be unjustifiable to impute to the law-making power a deliberate design frequently to leave a majority of the stock of a corporation without power to act, and thus render it impossible to hold a stockholders' meeting for any purpose. Unlike the doctrine of the common law, which allows any minority of the stockholders, however small, to constitute a quorum (1 *Mor. Priv. Corp.*, § 476), our statute requires a vote of stockholders representing a majority of the subscribed capital stock (*Comp. Laws*, § 2925) to elect directors. Moreover, the provision that the pledgeor, and not the pledgee, should be liable for the debts of the corporation, to the extent of a stockholder's liability, clearly indicates that it was intended that the latter should have the right to make a transfer on the books, for without such transfer he is never liable. *Anderson v. Warehouse Co.*, 111 U. S. 479; 4 *Sup. Ct. Rep'r*, 525. There is a class of cases in which the books are not conclusive of the right of the person to vote who appears upon the books to be a stockholder.

The law will not allow the transfer upon corporate books to cover up the incapacity of the real owner to vote upon the stock. No corporation, in the absence of statutory permission, has any right to vote its own stock. Such stock having no vote, the colorable transfer of it upon the books will not give the person in whose name it stands authority to vote it. See *Ex parte Holmes*, 5 Cow. 426; *Frog Co. v. Havan*, 101 Mass. 398. But there is a marked difference between such a case and the case of a pledgee who in good faith holds the legal title to the stock. The rights of the pledgeor are in equity. He may, in a proper case, compel the pledgee to give him a proxy by a bill in equity. *Scholfield v. Bank*, 2 Cranch, 115; *Vowell v. Thompson*, 3 Cranch, 428; *McHenry v. Jewett*, 90 N. Y. 58; *Hoppin v. Buffum*, 9 R. I. 513. The fact that such suits have been instituted indicates the necessity for them.

A pledgeor who has a legal right to vote stock, notwithstanding it has been transferred on the corporate books, need not resort to equity for a proxy. Said the court in the last case cited: "If the real owner wishes to have his name, or the true state of facts, appear on the books, he has his remedy in equity to compel a proper transfer, or to compel the pledgee to give a proxy, as was done in the case of *Vowell v. Thompson*, 3 Cranch C. C. 428." The pledgee sustains a relation to the corporation. This is determined by the record. In dealings with the corporation, his *status* as a stockholder is fixed by the books. "As between a corporator and the corporation, the records of the corporation, or its stock-book, as it is called, is the evidence of their relation. Meetings of the stockholders, elections and dividends, etc., are regulated by this record." *Bank of Commerce's Appeal*, 73 Penn. St. 59. If the equities and contract relations between different persons, claiming the right to vote the same stock, are to be considered in determining the question of the right to vote, few elections would be certain, and the courts would often be called upon to investigate a multitude of collateral issues in determining who had been elected directors, or whether any other business transacted at a stockholders' meeting had the support of the requisite amount of stock. Said the court in *Hoppin v. Buffum*, 9 R. I. 513: "Upon any other rule, it could never be known who were entitled to vote until the courts had decided the

dispute. The corporation or its officers would have to decide it for the time, and it would leave the election in uncertainty."

The record fixes the *status* of a person as a stockholder; and another having an equitable right to wield the power of a stockholder, as between himself and the one who has the legal right, must enforce that equitable right by the decree of a court, before he can be recognized as a stockholder in his relations with the corporations. The legal title to the stock determines the right to vote, and the courts, on *quo warranto* or on summary proceedings under the statute, cannot regard and enforce a merely equitable right. It is true that under the statute the court is authorized to award broader relief than on *quo warranto*. It may declare a different set of directors elected, but the proceeding in its essential nature is a proceeding at law to determine who had the legal right to vote as stockholders at a stockholders' meeting for directors or for other purposes. That the legal title to stock hypothecated and transferred to the creditor on the books is in the creditor so far as dealings with the corporation are concerned is elementary. *National Bank v. Watson*, 105 U. S. 217; *Wilson v. Little*, 2 N. Y. 448; *Ang. & A. Corp.*, § 580; *Pullman v. Upton*, 96 U. S. 328; *Bank v. Case*, 99 U. S. 628; *Coleb. Coll. Sec.*, § 282. It is not strictly accurate to speak of the creditor holding hypothecated stock transferred on the corporate books as a mere pledgee. His relation to the debtor and to the corporation may be more accurately described. He is a holder of the legal title to stock as collateral security. The debtor has a general right to the return of his property and its title, on payment of his obligation. By his voluntary act, the debtor has conferred upon the creditor all the rights of a stockholder by authorizing him to transfer the stock on the corporate books. In this case the debtor himself made the transfer by canceling his certificates, and issuing in their place others directly to the creditors' agent, signed by himself as president of the corporation. We are clearly of the opinion that Faulkner, and not Edwards, was entitled to vote the five hundred and forty-five shares of stock in question. The agreement between Hill and Edwards that the stock should be placed in the name of such person as Hill should designate, for the purpose of giving Hill control of the corporation, adds nothing to his legal rights, but it would be an import-

ant element in the case were Edwards here invoking equity to compel Hill to give him a proxy. The latter could use it as a defense to an application for such relief. If, however, as is contended by Mr. Edwards, Hill agreed to leave him in control of the corporation, a resort to equity to compel the giving of a proxy would be his proper remedy. Such issues cannot be tried at every election, nor is it the policy of the law that they should be. It would, indeed, be a startling doctrine that the legality of business transacted at stockholders' meetings should be subject to the ultimate decision of complicated questions arising between different claimants of the same stock. If Faulkner voted this stock at the meeting, it is our duty, under the statute, to declare the other set of directors elected. *Ex parte Desdoity*, 1 Wend. 98; *In re Barker*, 6 Wend. 509; *In re Election of Directors of Steamboat Co.*, 44 N. J. Law, 529; *In re Cape May & D. B. N. Co.* (N. J.), 16 Atl. Rep'r, 191. Before discussing this, however, we should dispose of a further question relating to the qualification of Faulkner to vote this stock. The statute declares that a stockholder must be a *bona fide* stockholder to entitle him to vote. This phrase, "*bona fide*," in this connection, is used in contradistinction to "bad faith." *In re Election of Directors of St. Lawrence Steamboat Co.*, 44 N. J. Law, 529, the statute required a person to be a *bona fide* stockholder to be eligible to the office of director. The court said, in construing this statute: "A stockholder may have purchased stock with a view of becoming a director, or have obtained it by gift, or he may hold it upon a trust, and be qualified to be a director. If the stock was legally issued, and was not the property of the corporation, and the legal title is in him, he is *prima facie* capable of being a director, and his right to be a director, in virtue of his legal title to such stock, can be impeached only by showing that title was put in him colorably, with a view to qualify him to be a director for some dishonest purpose, in furtherance of some fraudulent scheme touching the organization or control of the company, or to carry into effect some fraudulent arrangement with the company." But we do not think that Faulkner voted this stock for the persons who claimed to be elected as directors. It is undisputed that he did not vote the stock at the meeting over which Mr. Edwards presided. At the hour named for the meeting, Edwards

assumed to act as chairman, and directed a Mr. Flint to act as secretary. This was without objection. The call was then read. Next Edwards stated that the object of the meeting was to elect directors for the ensuing year. Ballot-boxes were then prepared, and nominations for directors were made by Edwards and by Mr. Faulkner. After that, some other routine business was transacted, and then an adjournment was taken, on motion of Mr. Faulkner, until afternoon. When the meeting was reopened, after the adjournment, Faulkner moved to reconsider all that had been done, on the ground that the president of the corporation had no right to act as chairman of the stockholders' meeting without election, and that he had not been elected or chosen chairman. In a word, Faulkner claimed that the meeting had not been properly organized. We think his claim came too late. He had acquiesced in the organization and had participated in the business of the meeting. He had even recognized, by making nominations for directors, that at that meeting, as so organized, the candidates for directors should be voted for. Failing in his efforts to reorganize the meeting, he withdrew from it without voting, or offering to vote, his stock for directors. It is true that Edwards had notified him that he would not be permitted to vote his stock for directors. But this would not dispense with affirmative action on his part. His secret intention to vote for certain persons for directors, without expressing that intention in a legal way, would not elect any one to office. It is true that Edwards might, and probably would, have refused to receive the ballot which he might have offered. But it was not in the power of Edwards, or of any one else, to prevent his voting at that meeting. There was, therefore, no reason for his withdrawing. It was his duty to remain at the stockholders' meeting as organized, and vote his stock at that meeting. This he did not do, and we are of opinion that voting the stock at another meeting, which he held with others in the same room, at the same time, was of no effect. A minority must have a right to insist that, after a meeting is organized, the majority shall not withdraw from it, and organize another meeting, at which the minority must appear or lose their rights. Once concede the right, and there is no limit to the number of wrecked meetings which may, at the caprice of a majority, precede the transaction of any business. Suppose the vote of two-thirds of

the stock voted is required to carry a measure under the law or the by-laws of the corporation. Stockholders having more than one-third of the stock present can vote it down. Can a majority, constituting less than two-thirds, withdraw from an organized meeting, and thus compel the minority to follow them, or lose their right to defeat the measure? We believe it would be unwise, and unjust as well, to sanction such a rule.

It is not essential to the protection of the majority who have the right to vote at the meeting as organized. On the other hand, the contrary rule is necessary for the protection of the minority. It is true that mere irregularities in conducting a meeting will not vitiate an election, but when a meeting is once organized it is not a mere irregularity to withdraw from it, and start a new one. The persons voted for at the second meeting cannot be adjudged to have been elected directors, without deciding both that the second meeting was valid and that the first was illegal. "The acts of a majority are not binding upon the company, unless the proceedings are conducted regularly, and in accordance with general usage, or in the manner prescribed by the charter and by-laws of the company." 1 Mor. Priv. Corp., § 487, and cases. See *In re Long Island R. Co.*, 19 Wend. 37. To elect directors, they must receive the vote of a majority of the subscribed capital stock. Comp. Laws, § 2925. This is fatal to the election of the persons voted for at the legal meeting. Only twelve shares were lawfully voted at that meeting. It was, therefore, error to dismiss the petition. It was the duty of the court, under the statute, to set aside the old, and order a new, election. *In re Long Island R. Co.*, 19 Wend. 37; Comp. Laws, § 2932.

There remains to be considered the qualification of one of the directors voted for at the pretended meeting by Faulkner. To be a director one must be a holder of stock. *Id.*, § 2926. Shortly before the election Faulkner transferred to B. F. Spaulding ten of the five hundred and fifty-six shares held by him, and on the day of election Spaulding demanded a transfer on the books. This request was refused. We do not think that he was eligible to the office of director. He did not appear to be a stockholder upon the books of the corporation. If he was entitled to have his transfer recorded, the corporation would be liable for its refusal, and he could recover the full value of his stock. 1 Mor. Priv. Corp.,

§ 217, and cases cited. Or he might compel a transfer by an application to a court of equity. *Id.*, § 220, and cases cited. But until such transfer is made he is not, under our statute, a stockholder in his relations with the corporation. Our statute in express terms declares, as we have already seen, that a transfer of stock, not entered upon the corporate books, shall not be valid for any purpose, except as between the parties. *Comp. Laws*, § 2915. If it is effectual to qualify the transferee for the office of director, it is valid for a very important purpose. We may not disregard the imperative provision of this law, nor can we shut our eyes to its very obvious policy. It would be as unfortunate, and as fruitful of confusion and litigation, to have the eligibility of a person for the office of director left in doubt at a stockholders' meeting to elect directors, as to have left in uncertainty the qualification of a person to vote as a stockholder for a director at that meeting.

Under a statute couched in the same language, it has been held that the assignor of stock not transferred on the corporate books, and not the assignee thereof, has the right to vote the stock at a meeting to elect directors. *People v. Robinson*, 64 Cal. 373; 1 Pac. Rep'r, 156; *State v. Pettineli*, 10 Nev. 141. See, also, 1 *Mor. Priv. Corp.*, § 433; *State v. Ferris*, 42 Conn. 560. The decisions in New Jersey and Oregon (44 N. J. Law, 529; 14 Pac. Rep'r, 814) are not of controlling force here, because our statute, by both its terms and its manifest spirit, compels the adoption of a different doctrine. A person who desires to be recognized as a stockholder, for the purpose of voting, of being a director, of suing for dividends, must secure such a standing by recording his transfer on the corporate books. Nor will the assignee be without remedy. The law affords him the two remedies referred to against the corporation for an unwarranted refusal to make the transfer; and he may, by a resort to a court of equity, compel his transferrer to give him a proxy after he has been unjustifiably deprived of his right to have his name entered upon the books of the corporation as a stockholder. Moreover, he can always insist on a transfer as a condition precedent to his purchase or loan on the security of the stock. Business prudence would prompt this caution. In cases where the corporation has a lien on the shares of its stockholders, the purchaser, without a transfer on the books, takes subject to the lien, and the corporation may refuse to

record the transfer until the lien is discharged. 1 Mor. Priv. Corp., § 203. By insisting on a transfer upon the books before he pays his money, the purchaser will secure his stock free from such lien, as the act of the corporation in making such transfer would be a waiver of the lien. *Id.*, § 208; *National Bank v. Watson*, 105 U. S. 217. In *Helm v. Swiggett*, 12 Ind. 194, it was held that a corporation, whose charter gave it a lien upon the stock of a stockholder for a debt owing to the corporation, had no lien for a debt of the assignee of stock on stock assigned, but not transferred on the books, the court saying: "Ownership simply of a certificate of stock in the bank did not constitute the owner of it a stockholder. It required a transfer of the stock to him upon the books of the bank." Referring to the provision requiring a transfer upon the books, Mr. Morawetz says: "It follows, therefore, that a transfer upon the books is essential to a novation of the contract of membership, where there is a provision of this description. An assignment of shares, although valid as between assignor and assignee, would not effect their legal relationship to the company until after a transfer was entered upon the books," etc. Vol. 1, § 170. Under our statute, no person can claim to be a stockholder, in his dealings with the corporation, until his name appears in some way as stockholder on the corporate books; and as the statute requires a person to be a stockholder, not stockowner, to entitle him to be a director, we are clear that Spaulding was not eligible to that office. "The directors of a corporation are generally required to be shareholders by express provisions of the company's charter or articles of association. A person is a shareholder, within the meaning of a provision of this description, if he holds shares on the books of the company, but not if he is merely the holder of the certificate. It has been held that the transferee on the books is eligible, although he is not the real owner of the shares, and the transfer was executed for the sole purpose of making him a director. A different rule might apply where the statute expressly requires the directors to be the owners of shares." *Id.*, § 506. Had Spaulding appeared as a stockholder on the corporate books, he would have been qualified to hold the office of director, although the transfer had been made to him for the sole purpose of so qualifying him. As he did not so appear, he was not eligible to that office.

It was urged that as Faulkner subsequently to the issue of the stock had indorsed it in blank, and left it in the possession of Hill, that he (Faulkner) had ceased to be a stockholder, and, therefore, had no right to vote the stock or be a director. Under our statute providing that an unrecorded transfer of stock shall not be valid for any purpose except between the parties, we are clearly of the opinion, as we have already stated in another connection, that until a transfer should be made on the books Faulkner would continue to be a stockholder, for the purpose of voting the stock or of being eligible to the office of director. *People v. Robinson*, 64 Cal. 373; 1 Pac. Rep'r, 156; *State v. Pettineli*, 10 Nev. 141; 1 Mor. Priv. Corp., § 483; *State v. Ferris*, 42 Conn. 560. There are certain findings of fact which we are unable to discover any evidence in the record to sustain. The view the trial court took of the law may, however, explain why they are embodied in the case. The court finds that Hill, in electing directors, was not to put in men unsatisfactory to Edwards. Mr. Faulkner, on cross-examination by Mr. Edwards himself, stated that Edwards said to Hill that Hill was to have a majority of the directors. Mr. Edwards then remarked: "Satisfactory to me, of course?" To this the answer was: "He was to pick his own men." This is all the evidence on the point. Mr. Edwards did not testify in the case. It is true that the record seems to show that Hill was not to put in men who were enemies of Edwards, but this will not justify a finding that the majority of the directors were to be satisfactory to Edwards. Many persons who were not his enemies might nevertheless be unsatisfactory to him. The most that it can be claimed that the evidence discloses is that the question as to what men the majority of the board should be composed of was to depend upon the fact not to be determined by Hill or Edwards finally, but by the courts; whereas, the finding would make Edwards the sole and final arbiter of the question. This would be repugnant to the spirit of the arrangement which was to prevent Edwards from dealing with the corporation and its assets to the prejudice of Hill. Prior to this time Hill had held, as collateral for this same debt, stock in another corporation controlled by Edwards. Hill discovered that the organization of this corporation had been suffered to lapse; that his stock had, therefore, become worthless; and that Edwards had formed a new corporation.

This stock had not been transferred on the books of the corporation, and Edwards, therefore, had full control of it, and by means of it had had complete control over the corporation. When Edwards proposed to give Hill stock in the new company as security, Hill said: "What good would that be if you form a third company?" To this Edwards replied that, to prevent this, Hill could have the stock put in his own name, and have absolute control, and then he would be safe, and a third company could not be started. Certainly, Mr. Hill would have no control whatever if Mr. Edwards were allowed arbitrarily to pronounce unsatisfactory every director for whom Mr. Hill or his representative should vote this stock. The effect would be that Mr. Hill would have control only on condition that he suffered Mr. Edwards to control him in exercising that control. Other findings it is not important to refer to, as a new election must be had.

The third conclusion of law is unwarranted. It states that Faulkner held this stock subject to the joint order of Hill and Edwards. Having made a transfer of the stock upon the records by issuing new shares directly to Faulkner, Edwards, as pledgeor, had no control over the stock without paying his debt. He could not control Faulkner in voting it without appealing to a court of equity under peculiar circumstances creating an equity in his behalf. Such circumstances are not shown by this record to exist in this case. This he did not do, and it was error to hold that he could, at a stockholders' meeting, exercise any control over the stock or over Faulkner, who held it. The judgment of the district court is reversed, and that court is directed to render judgment setting aside as illegal the election of A. W. Edwards, H. C. Plumley, M. R. Flint, Alexander Griggs and William A. Stevens, as directors, and ordering a new election to be had as required by the statute. The old directors will hold their office until their successors are elected and qualified. Comp. Laws, § 2924. It will be so ordered. All concur.*

Qualifications of directors.—In the absence of any restrictions in the law governing a corporation, a person is eligible to the office of director therein though he is not a stockholder, or a resident or citizen of the state. *Commonwealth v. Detwiler*, 1 Am. R. R. & Corp. Rep. 187; *Robinson v. Hemingway*, 1 Am. R. R. & Corp. Rep. 143, and note.

* Reported in 48 N. W. Rep'r, 347.

CALUMET RIVER R. CO. V. BROWN.

(Supreme Court of Illinois, Jan. 23, 1901.)

1. EMINENT DOMAIN. MORTGAGEES. Under a statute requiring all persons interested as owners or otherwise to be made parties, a railroad company instituted proceedings to condemn certain property. The damages were assessed and paid to the county treasurer. Before instituting proceedings the company applied to an abstract firm for the names of all persons interested in the property. The list was furnished, but, by mistake, the name of a mortgagee was omitted, and such mortgagee was not made a party. Held, that there was such a mistake as equity would relieve against, and that a bill would lie by the railroad company against the mortgagee and owner of the equity of redemption to have the money applied upon the mortgage.

2. RIGHTS OF MORTGAGOR IN SUCH CASE. The mortgagee was a necessary party to the condemnation proceedings, and his rights were not affected by a condemnation to which he was not a party.

3. FORM OF DECREE. The owner of the equity of redemption cannot complain of a decree which directs the award to be applied on the mortgage debt, and, in case of foreclosure, requires the mortgaged property to be sold in the inverse order of alienation, regarding the condemnation as an alienation, and, in case the balance of the mortgage debt is not thus realized, allowing a redemption of the damages by reasons of the taking.

A PPEAL from appellate court, first district. Bill by the Calumet River Railway Company against John B. Brown, Richard C. Dale and George R. Davis to restrain Davis from paying to Brown certain money which complainant deposited with Davis, as county treasurer, as compensation for land condemned for complainant's use. Complainant obtained a decree, which was reversed by the appellant court. Complainant and defendant Davis appeal.

Forrest O. Murdock and *Sidney Smith* for appellant Davis.
Frank J. Loesch and *Charles A. Allen* for appellant railway company. *Osborn & Lynde* for appellee.

MAGRUDER, J. In this case the appellant railway company instituted the proceeding for condemnation of land against the owner of the equity of redemption, and omitted to make the mortgagee a party to the proceeding. This omission was not due to the carelessness or negligence of the railway company, but was the result of a mistake. Section 2 of the eminent domain act provides that the petition shall state the names of "all persons

interested, as owners or otherwise," in the property to be taken or damaged. The holder of a mortgage upon the property is such an owner or interested party as should be made a party defendant. Here the mortgage to Dale was upon record when the petition was filed, and the name of the mortgagee thus appearing of record should have been stated in the petition for condemnation. In order to ascertain what persons were interested in or held liens upon the property, the company applied to a firm of abstract makers and conveyancers, whose business it was to furnish information upon such subjects, and received from such firm a report as to the title, which failed to give the name of Dale, or to show the existence of the Dale mortgage. The company was thus misled without fault of its own. It paid the whole amount of the condemnation money into the hands of the county treasurer before it learned that there was a mortgage upon the property condemned. The mortgagee Dale, and Drexel & Co., who were interested with him, must have known of the proceeding to condemn, because their agent and attorney was present at the trial of the condemnation suit. They did not, however, become parties by filing a cross-petition, as provided for in section 11 of said act. The appellee Brown, the owner of the equity of redemption, and the only defendant in the condemnation proceeding, communicated no information as to the existence of the mortgage. Still, neither Brown nor the mortgagee were responsible for the failure of the company to make the mortgagees parties. It remains true, nevertheless, that the payment of the money to the county treasurer would not have taken place but for the mistake of the abstract makers as to the condition of the record. Why should not equity relieve the company from the consequences of such mistake?

Let us see what consequences might follow. The sum of \$17,500 paid to Davis, the county treasurer, was not the value of Brown's equity of redemption only. It represented the full value of the property taken, and damages to the portion of block B not taken, the former being \$4,600, and the latter \$12,900. Brown insists upon the payment of all the money to him, and, if such payment should be made to him, he would be receiving more than the value of his interest in the property. Indeed, it is questionable if his interest is worth any thing. The amount of

the mortgage is \$150,000, and the proof shows that it exceeds the value of all the property subject to it. The proof also shows that Brown's indebtedness is not less than \$500,000. The mortgagees not having been made parties to the condemnation suit, their rights were not cut off by that suit. They are still entitled to foreclose their mortgage against the land condemned. If, therefore, the money is paid to Brown, the company may be compelled to pay for the land a second time by the foreclosure of the mortgage. Such a result as this would be inequitable in the extreme.

Where the power of eminent domain is exercised, the fund paid stands in the place of the land condemned; the lien attaches to the fund; "the rights of the mortgagee remain unaltered, and he is entitled to have the money in place of the land applied to the payment of his claim." 1 Jones Mortg., § 708; Railroad Co. v. Chamberlain, 84 Ill. 333; Commissioners v. Todd, 112 Ill. 379; Insurance Co. v. Slee, 123 Ill. 57; 12 N. E. Rep'r, 543. It is true that Dale and Drexel & Co. have not filed a bill to foreclose the mortgage, although it is overdue; they have made no application to Davis to have the money paid to them, and have made no opposition to the payment of it to Brown, not being willing, according to the proof, to "make an enemy of Brown by doing it." But at the same time they are entitled to have the money as an equivalent of the land; their lien in equity follows the fund, which is a substitute for the land. Sherwood v. City of Lafayette, 109 Ind. 411; 10 N. E. Rep'r, 89. This being so, there is reason here for the application of the well-known principle that a person having two funds to satisfy his demands shall not, by his election, disappoint a party having but one fund. 3 Pom. Eq. Jur., § 1414. Upon the assumption that the verdict and judgment would not have been more than \$17,500, if the mortgagees had been parties, and subject to the other qualifications hereafter stated, the mortgagees may either take the money and apply it on their debt, or resort to a foreclosure of their mortgage against the land condemned and damaged. They have two funds—the money and the land. The appellant company has but one fund—the land condemned—and in equity may require the application of the money to the debt before resort is had to the land.

Section 14 of the eminent domain act provides that the com-

penetration may in all cases be paid to the county treasurer, who shall, on demand, pay it to the party thereto entitled. The judgment in this case orders that the "petitioner pay to the county treasurer of Cook county, for the benefit of the owner, or to John B. Brown, claimed to be such owner, the sum of \$17,500." There is here no absolute direction to pay the money to Brown. The language is in the alternative, and contemplates that some other person than Brown may be the owner. Surely a court of chancery may determine who is the owner; for whose benefit the money was paid. As between the mortgagors and mortgagee, the fund belongs to the latter to the extent of the mortgage debt. As between Brown and Dale or Drexel & Co., the fund belongs to the latter, inasmuch as the mortgage debt exceeds the fund. There can be no injustice in this view, as the appellee receives the benefit of the money when it is credited upon his debt. *Commissioners v. Todd*, and *Insurance Co. v. Slee*, *supra*.

It is said, however, that the mortgagees, not having been made parties to the condemnation proceeding, did not have their day in court, and had no hearing upon the question as to what was a just compensation to be paid by the railroad company. This is true, and the mortgagees are still entitled to such hearing; they are not bound to accept \$17,500 as the exact and whole amount to be paid by the company without a chance to be heard upon that subject, either in a proceeding by the company to condemn their interest or otherwise. *Mills Em. Dom.*, § 74; *Lewis Em. Dom.*, § 324; *Wilson v. Railway Co.*, 67 Me., 358. But are they not fully protected in this regard by the decree of the circuit court? By the terms of that decree they are authorized to receive the \$17,500, and have it credited upon their debt, and, if the balance of the debt is not paid, and they are obliged to resort to a foreclosure, they are further authorized to have a revaluation of the land taken, and a redetermination of the damages to the land not taken, either by an issue out of chancery, or by some proceeding of their own selection; and, should the amount of a just compensation be thereby found to exceed \$17,500, to have the excess applied upon the mortgage. It is claimed, however, that the decree is erroneous, under the doctrine laid down in *Insurance Co. v. Slee*, *supra*, where it was said that proceedings to condemn property under the eminent domain act are legal, and not equitable, and that it would

be inconvenient for a court of equity to remit the matter of condemnation to a court of law for trial according to the rules and practice in trials at law. The statement thus made in the *Slee Case* is correct as a general proposition, and as applicable to the facts of that case; but it can have no application to the circumstances of the present case, as will appear from a brief examination thereof. Here the decree directs that, in case of a foreclosure of the mortgage, the property mortgaged shall be sold in the inverse order of alienation, treating the taking of the strip of land condemned by the company as an alienation. It is certainly in accordance with equitable principles that the balance of the mortgaged land be sold first, before resorting to the strip taken for railroad purposes. But it appears from the evidence in this case that the appellant company has taken possession of the strip of land condemned by it, and has improved it, and built its right of way upon it, and is using the improvements. If upon foreclosure the debt is not paid by the sale of the rest of the mortgaged land, how is the lien to be enforced against the strip thus taken and improved? Shall the right of way be sold with the railroad tracks and other improvements upon it? Ordinarily, fixtures placed upon mortgaged premises by the mortgagor become a part of the realty, and inure to the benefit of the mortgagee by increasing his security. But it has been held that, in such a foreclosure as that now under consideration, the holder of the mortgage ought not to be allowed to sell the road, track, superstructure and fixtures, placed upon the land at great expense by the railroad company, for the reason that the public has an interest in the successful operation of the road, and that, therefore, equity only requires the company to make compensation by paying the value of the land at the time it was taken, and interest on that amount. *Kennedy v. Railway Co.*, 22 Wis. 581; *Aspinwill v. Railway Co.*, 41 Wis. 474; *Wooster v. Railroad Co.*, 57 Wis. 311; 15 N. W. Rep'r, 401; *Wilson v. Railway Co.*, supra. Hence some method must be adopted of ascertaining what the value of the land condemned was at the time when it was taken, exclusive of the value of the improvements placed upon it by the railroad company since that time. It would seem that the proper method to be adopted for such purpose is the statutory method, or that prescribed by the eminent domain act for ascertain-

ing the amount of compensation. *Kennedy v. Railway Co.*, *supra*.

The decree of the circuit court in the case at bar conforms to the rule thus laid down in the Wisconsin cases, and may be regarded as correct, so far as it has reference to the value of the strip of land taken. To what extent is it correct in requiring the amount of damages to the portion of block B not taken to be ascertained, and the excess thereof, if any, over the damages found by the jury in the condemnation proceeding, to be applied upon the mortgage debt? The verdict in that proceeding showed, separately, the value of the part of the block which was taken, and the damages to the part thereof not taken. The judgment also refers to the total amount as being for both value and damages. After the court of chancery has directed an issue at law to be tried to ascertain the value of the land taken exclusive of the improvements upon it, it could easily be determined at the same time, as an incident to such issue, what were the damages to the land not taken at the time of the condemnation. As such damages had the effect of lessening the value of the land subject to the security of the mortgage, it would be equitable to credit them upon the mortgage debt. But if the decree is erroneous in directing such damages to be ascertained, and the money now in the hands of the county treasurer is paid to the appellee, Brown, how are the mortgagees to receive the benefit of the damages in the event of a foreclosure? This is not a case where the condemnation money has already been paid to the mortgagor. The present bill was filed, and an injunction was obtained, while the money was yet in the hands of the county treasurer. If the money is paid to Brown, then when the foreclosure takes place the mortgagees will sell the land damaged, but not taken, at its reduced value. If there is no way under the foreclosure proceeding to ascertain the damages, and require the payment of the same, then the mortgagees will be remitted to their action at law against the railway company or Brown, the mortgagor. In *Wilson v. Railway Co.*, *supra*, where the mortgagee was not made a party to the condemnation proceeding and the condemnation money was paid to the mortgagor, the mortgagee was allowed to maintain trespass against the railroad company. Consequently, if the decree of the circuit court is erroneous in the particular now under discussion,

it is difficult to understand why Dale or Drexel & Co., should object to it. It is favorable to them, in that it gives them a chance to show, if they can, that the value of the land taken was greater than \$4,600, and that the damages to the land not taken were more than \$12,900, and gives them the benefit of the excess, if excess there is. The mortgagees, however, are not objecting to the decree. Decree *pro confesso* was rendered against them. They assigned no errors in the appellate court. They have assigned no cross-errors here. It does not lie in the mouth of the appellee Brown to object to the decree, so far as it provides for the proceedings under the foreclosure hereafter to be had. The judgment already rendered in the condemnation suit is binding upon him. He was a party to that suit, and introduced evidence upon the trial of it. He is estopped from denying that the sum of \$17,500 is just compensation for the value and the damages. His assignments of error merely question the justice of the decree, in so far as it orders the money now in the county treasurer's hands to be paid to the mortgagees, and not to himself. As we hold that the money should be applied upon the mortgage debt which he owes, it is unnecessary to indulge in any further discussion as to those features of the decree which concern the mortgagees only. It follows from the views here expressed that the judgment of the appellate court must be reversed, and the decree of the circuit court affirmed. It is accordingly so ordered.*

Eminent domain — the interests of mortgagees.—On the question whether mortgagees are necessary parties to condemnation proceedings, the authorities are not only conflicting but very unsatisfactory. The following hold or favor the view that they are necessary parties: *South Park Comrs. v. Todd*, 112 Ill. 379; *Deisner v. Simpson*, 72 Ind. 435; *Sherwood v. LaFayette*, 109 Ind. 411; *Severin v. Cole*, 38 Iowa, 463; *Wilson v. European & North American Ry. Co.*, 67 Me. 358; *Siman v. Roads*, 24 Minn. 25; *Stewart v. Raymond R. Co.*, 7 S. & M. 563; *Mich. Air Line Ry. Co. v. Barnes*, 40 Mich. 883; *North Hudson Co. R. Co. v. Booraem*, 28 N. J. Eq. 450; *S. C. below, Booraem v. Wood*, 27 N. J. Eq. 871; *Platt v. Bright*, 29 N. J. Eq. 138; *Warwick Institute for Savings v. Providence*, 12 R. I. 144; *Hagar v. Brainard*, 44 Vt. 294; *Wade v. Hennessy*, 55 Vt. 207; *Adams v. St. Johnsbury & Lake Champlain R. Co.*, 57 Vt. 240; *Kennedy v. Mil. & St. P. Ry. Co.*, 23 Wis. 581; *Aspinwall v. Chicago & N. W. Ry. Co.*, 41 Wis. 474; *Wooster v. Sugar River Valley R. Co.*, 57 Wis. 311; *Martin v. London, Chatham, etc., R. Co.*, L. R., 1 Eq. Cas. 145; 1 Jones Mortg., § 681.

The following hold or favor the opposing view: *Whiting v. New Haven*,

* Reported in 26 N. E. Rep'r, 501.

45 Conn. 303; Cool v. Crommet, 13 Me. 250; Breed v. Eastern R. Co., 5 Grey, 470; Paine v. Woods, 108 Mass. 160; Vaugh v. Wetherell, 116 Mass. 188; Farnsworth v. Boston, 126 Mass. 1; Read v. Cambridge, 126 Mass. 427; Bancroft v. Cambridge, 126 Mass. 438; Welch v. Boston, 126 Mass. 442; Grand Rapids v. Grand Rapids & Ind. R. Co., 58 Mich. 641; Astor v. Hoyt, 5 Wend. 603; Hooker v. Martin, 10 Hun, 302; Home Ins. Co. v. Smith 28 Hun, 296; Bank of Auburn v. Roberts, 44 N. Y. 192; Parish v. Gilmanton, 11 N. H. 293; Pres., etc., of Schuylkill Navigation Co. v. Thoburn, 7 S. & R. 411; Keystone Bridge Co. v. Summers, 13 W. Va. 476.

The cases go almost entirely upon the language of the statutes, as though it was a matter entirely within the control of the legislature. It seems to us that a mortgagee stands upon higher ground; that his interest in the land and the right secured to him by his mortgage are property which cannot be taken from him without notice and an opportunity to be heard. Where a right of way is taken through a farm it may be a matter of slight consequence. But, when an entire tract is taken which is mortgaged for all it is worth, and the compensation handed over to an insolvent mortgagor, it becomes a very serious matter. *Severin v. Cole*, 38 Iowa, 463. This looks very much like depriving a man of his property without compensation and without due process of law. In our opinion a mortgagee is entitled to notice as a matter of right, and, if not made a party, his rights will remain unaffected. All the courts agree that a mortgagee in possession must have notice. *Cool v. Crommet*, 13 Me. 250; *Parish v. Gilmanton*, 11 N. H. 293; *Parker, etc.*, 36 N. H. 84; *Ballard v. Ballard Vale Co.*, 5 Grey, 468. Those courts which hold that the mortgage is divested without making the mortgagee a party also hold that the mortgage lien in equity follows the fund, which is a substitute for the land, and that the mortgagee may have it applied upon the mortgage debt, even though the debt is not due. *Farnsworth v. Boston*, 126 Mass. 1; *Danforth v. Suydam*, 4 N. Y. 66; *Bank of Auburn v. Roberts*, 44 N. Y. 192; *Hooker v. Cartin*, 10 Hun, 302; *Astor v. Hoyt*, 5 Wend. 603; *Platt v. Bright*, 29 N. J. Eq. 128. And in those states where the mortgagee is held to be a necessary party, it is held that, where proceedings have been had to which he is not a party, his interest may be divested by a subsequent condemnation, and that the damages will be assessed as of the time of entry. *Kennedy v. Mil. & St. P. Ry. Co.*, 23 Wis. 561; *Aspinwall v. Chicago & N. W. Ry. Co.*, 41 Wis. 474.

A statute which requires all persons having an interest in lands to be made parties, has been held to include mortgagees even in states which hold that mortgagees are not entitled to notice as owners. *Wilson v. European, etc.*, 67 Me. 358; *Mich. Air Line Ry. Co. v. Barnes*, 40 Mich. 383. The term "owner," when used to describe those to whom compensation should be made or who should be made parties to proceedings, has been held to include mortgagees. *Sherwood v. LaFayette*, 109 Ind. 411; *Severin v. Cole*, 38 Iowa, 463; *Dodge v. Omaha, etc., R. Co.*, 20 Neb. 276; *Wade v. Hennessy*, 55 Vt. 207. *Contra*, *Parish v. Gilmanton*, 11 N. H. 293. The words, "persons interested," in similar statutes would undoubtedly include mortgagees. *Wilson v. European, etc., Ry. Co.*, 67 Me. 358; *Mich. Air Line Ry. Co. v. Barnes*, 40 Mich. 383; *State v. Easton & Amboy R. Co.*, 36 N. J. Law, 181.

If the mortgagee is not made a party, it has been held that he may by bill subject the award to the payment of his debt. *Wood v. Westborough*, 140

Mass. 408; *Bank of Auburn v. Roberts*, 44 N. Y. 192; *Hooker v. Martin*, 10 Hun, 802; *Platt v. Bright*, 29 N. J. Eq. 128. But where, after condemnation proceedings were commenced, a bill to foreclose a mortgage on the property was filed and there was a sale of the property resulting in a deficiency, it was held that a motion in the foreclosure suit to have the award brought in and applied to extinguish the deficiency, was properly denied for want of jurisdiction over proper parties or the fund. *Schermerhorn v. Peck*, 48 Kans. 687. But if the mortgagee is a necessary party to condemnation proceedings, as we hold to be the case, then he is not affected by proceedings to which he is not a party, and, if default be made in the payment of the mortgage debt he may have the same remedy by foreclosure that he would have if the property condemned had been conveyed to private uses. *Severin v. Cole*, 88 Iowa, 463; *Dodge v. Omaha, etc.*, R. Co., 20 Neb. 276; *Sherwood v. LaFayette*, 109 Ind. 411; *North Hudson R. Co. v. Booraem*, 28 N. J. Eq. 450; *Wade v. Hennessey*, 55 Vt. 207; *Adams v. St. Johnsbury, etc.*, R. Co., 57 Vt. 240; *Kennedy v. Milwaukee, etc.*, R. Co., 20 Wis. 581. The decree in case of non-payment should be first for the sale of the balance of the tract subject to the rights of the party condemning, and, if that prove insufficient, then for the sale of the part condemned. *Ibid.* In *Kennedy v. Milwaukee, etc.*, R. Co., 22 Wis. 581, the court stayed the foreclosure to enable the railroad company to have the property regularly condemned.

UPHAM V. DETROIT CITY RY. CO.

(Supreme Court of Michigan, Feb. 27, 1891.)

1. STREET RAILROADS. INJURY TO PASSENGER. RIDING ON PLATFORM. It is not negligence *per se* to ride on the platform of a street-car, though there is room within; and an instruction that this fact will prevent a recovery for an injury to a passenger resulting from the negligence of the street-car company is error.

ERROR to circuit court, Wayne county, Henry N. Brevoort, judge.

Action by Charles E. Upham against the Detroit City Railway Company. There was a verdict for defendant, and plaintiff brings error.

John G. Hawley for appellant. *Sidney T. Miller and Brennan & Donnelly* for appellee.

GRANT, J. Plaintiff was injured while riding upon one of defendant's cars, under the following circumstances: On September 17, 1890, in the evening, plaintiff, with his wife and children

and some friends, had returned by boat from the exposition grounds, landing at the foot of Woodward avenue. A street-car was standing there, and many passengers from the boat rushed for the car. Plaintiff and his party went to the front of the car. He entered with the ladies and children of his party, while his friend Mr. Metcalf remained upon the front platform. Some of them secured seats, and the others stood up. After providing for them as well as he could, he returned to the front platform. The car was drawn by horses. Shortly after the car started it struck a switch, and plaintiff, who was standing with his back against the door, was thrown to the pavement, and severely injured. Plaintiff brought this suit to recover damages, alleging that the defendant was guilty of negligence, in that it drove and propelled the cars without any notice or warning to plaintiff, against and around said switch. Upon the conclusion of the testimony defendant's counsel requested the court to instruct the jury that there could be no recovery by plaintiff. This the court declined to do, but said the cause "would be submitted to the jury with the instruction that, if plaintiff could have remained in the car, he could not recover; but if it was so full that he could not get a place to go to in the car, then he could recover; and if there were room enough for him to remain in the car, when he went in, it was his duty to remain." After the judge had announced his conclusion upon the law, neither of the counsel desired to make any argument to the jury. The court thereupon instructed the jury, and in closing said to them: "The question for you to decide is simply this: When he went into the car, could he have remained in there? That is to say, was there room enough for him to remain there without going outside? If there were room enough to remain there, and he went outside voluntarily, then he cannot recover. If you should find that there was not room enough to remain there; that the car was full; that he could not stay there; that he was obliged to stand outside to get carriage—then, gentlemen, you are to consider the damages he has suffered, and award him damages for loss of services, physician's bill, and for the injury that has befallen him." Under these instructions, the jury found a verdict of no cause of action.

The question of fact submitted to the jury has been by them decided against the plaintiff. The jury could not well have found

otherwise, for the plaintiff's own witnesses testified that there was plenty of standing room inside. Mrs. Metcalf testified that "there was no difficulty about persons standing up inside the car, if they desired to; that there was room enough, if they preferred to stand inside to outside." Miss Mary Metcalf testified that there was plenty of standing room inside when plaintiff went out. The car was supplied with straps for passengers to take hold of when compelled to stand up. We must, therefore, determine the defendant's liability upon the fact found by the jury that the plaintiff voluntarily left the car when there was room for him to ride within it, and voluntarily stood upon the platform.

Is the company liable under such circumstances for negligently driving its car? Defendant's counsel assert the plaintiff left a place of safety inside the car, and voluntarily chose one of danger upon the platform, and that, as his injury was due in part to the fact that he voluntarily took that position, he cannot recover; and that he took an unnecessary risk is evidenced by the fact that no one who was standing within the car was injured. They also assert that the law recognizes but two excuses for leaving a place of safety for one of danger: (1) Where a party, whether erroneously or not, acted under the reasonable impulse of fear produced by another; and (2) where one has tried to save human life, when such effort did not amount to rashness, neither of which the plaintiff can of course make. The answer to the question depends entirely, we think, upon whether or not it is negligence *per se* to ride upon the platform of a street-car when one may ride within. Whether one leaves the car, after entering, to ride upon the platform, or whether he steps upon the platform without entering, is of no consequence. His act is as voluntary in the one case as in the other, and the same rule must govern both. The record is entirely silent as to any regulations on the part of the defendant in this report. But we cannot denude ourselves of the knowledge, which is alike common to all, that passengers are constantly riding upon these platforms with the tacit assent of the defendant, and without any protest, notice, or regulation. We must, therefore, determine the question with the fact before us that his use of the platforms is permitted by the defendant without objection. It is recognized as dangerous *per se* to ride upon the platform of the ordinary steam railway. This is apparent to any one, and the

difference in danger between riding there and upon the platform of the street-car is too obvious to require comment. Authorities discussing the question afford no light in the determination of this. In the presence of the fact that passengers are permitted to ride upon these platforms constantly, can courts hold them to be dangerous *per se*? If the railway companies considered them dangerous places, would they not take some means to notify passengers not to ride there, or to inform them that they did so at their own risk? It is certainly reasonable to presume that they would. That they do not consider them dangerous is further apparent from the fact that, when their cars are full, they stop them to take on more passengers, and thus invite them to ride upon the platforms. This appears to be their constant custom. It is evident that the public do not consider these platforms places of danger from the fact of their constant use. It is, therefore, difficult to see upon what reasons courts can hold that they are dangerous, and that persons who ride there assume all the risk, and thereby relieve such companies from all liability except for gross, willful and wanton misconduct. Under the facts shown by this record, the question of the negligence of the plaintiff, as well as of the defendant, belonged to the jury to determine, and should have been submitted to them under the proper instructions. Such, in my judgment, is the rule established by the clear weight of authority. *Nolan v. Railroad Co.*, 87 N. Y. 63; *Maguire v. Railroad Co.*, 115 Mass. 239; *Railway Co. v. Walling*, 97 Penn. St. 55; *Meesel v. Railway Co.*, 8 Allen, 234; *Burns v. Railway Co.*, 50 Mo. 139; *Railroad Co. v. Renz*, 55 Ga. 126; *Seigel v. Eisen*, 41 Cal. 109. This is not in conflict with the case of *Downey v. Hendrie*, 46 Mich. 498; 9 N. W. Rep'r, 828, where the plaintiff went through the car to the front platform and sat on the driving-bar, a thin iron rail not exceeding an inch in thickness, from which he fell under the car. We have no doubt of the correctness of that decision. It is within the power of street-railway companies to prohibit passengers from riding upon the platforms, or to give notice that those who ride there must do so at their own risk, or to limit the number of passengers which each car shall carry, and to require them to ride inside the cars. Until they adopt some such regulations, and notify the public, it is but reasonable to hold them liable for injuries, resulting from their

own negligent acts, to their patrons, who are themselves in the exercise of reasonable care, whether riding upon the platforms or within the cars. Judgment must be reversed, with costs, and a new trial ordered. The other justices concurred.*

1. Carriers of passengers — contributory negligence — riding on platform of street car.—For a general treatment of the question of contributory negligence in riding on the platform of a street or railroad car, see *Lehr v. Steinsway & Hunter's Point R. Co.*, 2 Am. R. R. & Corp. Rep. 240, and note; *Baltimore, etc., Turnpike Co. v. Casan*, 3 Am. R. R. & Corp. Rep. 224, and note. The following recent decisions are noted:

In an action against a street-railway company for personal injuries it appeared that plaintiff, a boy of thirteen, a passenger on a crowded car, sat on the front platform, with his feet on the step, and his knees projecting several inches beyond the side of the car, and was struck on the knees, and knocked under the car, by a mortar-box which builders had placed in the street only a few inches from passing cars. Held, that a compulsory nonsuit was properly ordered because of contributory negligence on the part of plaintiff and absence of negligence on defendant's part. *Butler v. Pittsburgh, etc., R. Co.*, 139 Penn. St. 195; 21 Atl. Rep'r, 500.

Plaintiff, a boy fourteen years old, was a passenger on one of defendant's street cars. The car was crowded, and he was standing on the front platform leaning against the dasher. He either fell off, or, as he claimed, was pushed off, by passengers getting off, and was run over. Held, that there was no error in charging that defendant was not liable for the conduct of the passengers unless it was unusual and disorderly, and could have been prevented by the persons who had charge of the car at the time. *Randall v. Frankford, etc., R. Co.*, 139 Penn. St. 464; 22 Atl. Rep'r, 639.

Plaintiff, a boy eight years of age, voluntarily, and without the knowledge of the conductor, went to the front platform of a horse-car to join his companion. The conductor opened the wicket in the front door, and asked plaintiff's companion for his fare, and upon the latter stating that he had paid his fare on another car, said he must either pay or get off, and opened the door. As he did so, plaintiff stepped with one foot down on the step of the car, and attempted to get off backward. The driver caught him, and placed him back on the platform, saying, "Don't you get off, you will fall;" but almost immediately, plaintiff repeated the act, and was either thrown off or jumped off backward, and was injured. Held, that there was no evidence of negligence on the part of the company. *Sandford v. Hestonville, etc., R. Co.*, 186 Penn. St. 84; 20 Atl. Rep'r, 799.

2. Riding or being on the platform of a steam railroad car.—In an action by a passenger for personal injuries, where the evidence shows that plaintiff started into another car to get water while the train was moving slowly, but stopped a minute on the platform to talk, and, just as he was passing on, the coupling-pin broke, and the cars parted, throwing him off, it is error to direct a nonsuit on the ground that plaintiff was not in the exercise of ordinary care. *Cotchett v. Savannah, etc., Ry. Co.*, 84 Ga. 687; 11 S. E. Rep'r, 553.

* Reported in 48 N. W. Rep'r, 190.

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A passenger on defendant's train found the rear car full, and attempted to pass to the next car. The distance between the platforms of the two cars was about six inches, and there was nothing to prevent her from stepping from one platform to the other; but, without looking, she placed her foot on the buffers just as the train started, and her foot was caught and injured. She had been lame for many years, and had often traveled on this train. The evidence also showed that the train started with a jerk, and did not stop as long as usual at that place, but the train had no fixed time to stay there, or for leaving. Held, that plaintiff was guilty of contributory negligence. *Snowden v. Boston & Me. R. Co.*, 151 Mass. 290; 24 N. E. Rep'r, 40.

Where plaintiff went upon the platform of the car as the train was nearing the station, with a view to alighting before the train stopped and was thrown off and injured by the sudden jerking of the train, it was held he was guilty of such contributory negligence as would preclude his recovery. *Patterson v. Central R., etc., Co.*, 85 Ga. 653; 11 S. E. Rep'r, 872.

Where plaintiff was on the platform of the car when he was injured, and testifies that he went there because he feared that some accident would result from the unusual speed of the train, and intended in that event to jump into the sand on the side of the road, it is a question for the jury whether his action was that of a person of ordinary care and prudence. *Mitchell v. Southern Pac. R. Co.*, 87 Cal. 62; 25 Pac. Rep'r, 245. To the same effect is *Cody v. New York, etc., R. Co.*, 2 Am. R. R. & Corp. Rep. 618, where the plaintiff, fearing an accident, went into the baggage-car and stood by the door prepared to jump in case his fears were realized.

Civil Code of California, section 484, absolving railroad companies from responsibility for injuries received by passengers while riding on the platform of a car in violation of the printed and posted regulations of the company, does not apply where the person so injured went upon the platform, in the exercise of ordinary care and prudence, to escape the consequences of an accident which he feared from the unusual speed at which the train was running. *Mitchell v. Southern Pac. Ry. Co.*, 87 Cal. 62; 25 Pac. Rep'r, 245. It is error to refuse to admit evidence that the other passengers remained seated in the car and were not injured, as their actions are part of the *res gestae*, and tend to show what they regarded as prudent conduct under the circumstances. *Ibid.*

MCCARTHY ET AL. V. NEW ENGLAND ORDER OF PROTECTION ET AL.

(Supreme Court of Massachusetts, Feb. 27, 1891.)

1. **MUTUAL BENEFIT SOCIETIES. DEPENDENT PERSONS. MEMBER'S FIANCÉE AS BENEFICIARY.** Under Acts Massachusetts 1882, chapter 195, section 2, which provides that mutual benefit societies may make their certificates payable to the "widows, orphans or other relatives of deceased members, or any persons dependent upon deceased members," a certificate may be made payable to a member's *fiancée*, who is supported partly by her own labor and partly by money paid her by such member, though he is under no legal obligation to make such payments.

2. CHANGE OF BENEFICIARY. Where a society's by-laws provide in what way the beneficiary may be changed, an attempt by the member to change the beneficiary by will, without complying with the requirements of the by-laws, is inoperative.

REPORT from supreme judicial court, Suffolk county, W. A. Field, judge.

Action by the heirs of John J. McCarthy, deceased, against the New England Order of Protection and Sarah Jane Judge on a membership certificate issued by the society to McCarthy for the benefit of Miss Judge, his *fiancée*. The society admitted its liability on the certificate, and the question at issue was as to the person entitled to the money.

J. A. McGeough for plaintiffs. *H. Avery* and *P. Webster* for defendant Judge.

MORTON, J. The statute in force at the time the defendant corporation was organized provides that "a corporation organized for any purpose mentioned in section 2 may, for the purpose of assisting widows, orphans or other relatives of deceased members, or any persons dependent upon deceased members, provide in its by-laws for the payment by such member of a fixed sum, to be held by such association until the death of a member occurs, and then to be forthwith paid to the person entitled thereto." Acts 1882, chap. 195, § 2. It is evident from the language here used that, while widows, orphans or other relatives may be "persons dependent upon" a deceased member, it is within the contemplation of the statute that a person may be dependent upon a deceased member who is not a widow, or orphan or relative of such member, and that it is one of the objects of the statute to provide that such persons may share in the benefits of the association which may be organized under it. The purpose seems to have been to provide that "widows, orphans or other relatives," whether dependent or not, might be designated as beneficiaries, and that any other person who is dependent upon a member, although not a widow, or orphan or other relative, may also be designated by him as a beneficiary. Acts 1877, chap. 204, § 1; Pub. St., chap. 115, § 8; Acts 1882, chap. 195, § 2; Acts 1888, chap. 429, § 8. Nor is there any thing in the statute which requires that the dependent person should be le-

gally or wholly dependent upon a member. On the contrary, the enumeration of the classes of persons who would be legally dependent upon a member, followed by a phrase distinctly intended to include other persons, would seem to establish conclusively that legal dependency was not the test. Nor can it be justly said that if the beneficiary is dependent in part he or she is not dependent. Cases will readily occur to one in which persons are partly supported or partially assisted by others. It would be giving an unnecessarily harsh construction to a statute which the court has said should be construed "liberally, and in such a manner as to carry out the benevolent purpose sought to be provided for," to hold that such cases were excluded from it. *American Legion of Honor v. Perry*, 140 Mass. 580; 5 N. E. Rep'r, 634. Trivial or casual, or, perhaps, wholly charitable assistance would not create a relation of dependency within the meaning of the statute or by-laws. Something more is undoubtedly required. The beneficiary must be dependent upon the member in a material degree for support or maintenance or assistance, and the obligation on the part of the member to furnish it must, it would seem, rest upon some moral or legal or equitable grounds, and not upon the purely voluntary or charitable impulses or dispositions of the member. *American Legion of Honor v. Perry*, supra; *Bac. Ben. Soc.*, § 261; *Ballou v. Gile*, 50 Wis. 614; 7 N. W. Rep'r, 561.

Applying these considerations to the case before us, we think it is clear that Miss Judge was dependent upon McCarthy, within the meaning of the statute and of the by-laws of the corporation, both at the time when the certificate was taken out and at the time of his death. From October, 1888, up to the time of his death in August, 1889, she received from him weekly from \$2 to \$5 towards her support, in addition to her own wages, which averaged during the same time \$4.38 per week.

The sums which she thus received from him contributed in a material degree to her maintenance. The chief justice who heard the case found as a fact that what she earned at Fleming's per week "was less than she had been accustomed to earn as table girl, and less than she could live on as she had been accustomed to live, and less than she could comfortably live on, and that the contributions of money by McCarthy while she was working at

Fleming's were reasonably necessary for her comfortable support during that time." He also found that McCarthy's "promise to give her money was understood by both to have been made and accepted because they were engaged to each other," though "neither regarded it as an independent contract;" that "she was under no obligation to remain at Fleming's longer than she wished;" and that "she would not have accepted money from him, and he would not have given it, if they had not been engaged," and the arrangement was made with "her as his intended wife, and was understood to be conditional and dependent upon that relation." The fact that Miss Judge was the affianced wife of McCarthy would not, as matter of law, constitute her a dependent upon him (*American Legion of Honor v. Perry*, 140 Mass. 580; 5 N. E. Rep'r, 634), and the statute of 1890, chapter 341, was not passed till after the certificate was issued, and, therefore, does not apply. It is questionable, too, whether McCarthy's promise to contribute to her support could have been legally enforced by her. But, we think, in view of the relation between them, she had a right to receive and depend on his assistance, and that he was under a moral obligation, after promising it, to continue to furnish it. She in fact depended on it, and was aided by it for many months, and down to his death. The money was not given by him nor received by her as a charity, but was given to and received by her as his intended wife—as a person who in some sort had a claim upon him. And whatever his legal rights may have been, it plainly was not expected by either that, so long as the relation between them continued, his assistance would be refused or withheld; and so her dependence on him had a certain quality of permanency, and was not casual or merely temporary. The fact that she could have gone back to her employment as table girl and have supported herself, as she had been accustomed to do before going to work at Fleming's, and the fact that since McCarthy's death she has supported herself, cannot affect her *status* at the time of his death and at the time when the certificate was taken out. If her situation since McCarthy's death or at the time of the trial is material, it would seem to be disposed of by the finding of the chief justice that "the money payable under the policy would enable her to live much more comfortably than she can without it." To assist dependent persons to live more com-

fortably after the death of a member is clearly one of the purposes for which a benefit certificate may be issued.

It is objected that at the time of McCarthy's death she had ceased to be dependent upon him. But, although there had been some difference between them — "probably a lover's quarrel," it is said — and his feelings had for the time being become alienated from her, it is expressly found that up to the time when he died he had not absolutely decided to break the engagement, and that the engagement was not broken while he lived. He gave her \$2 on the Monday night before he died, and she expected to meet him again, and make up whatever quarrel they had had, and "did not understand that the engagement had been broken, or that he had made up his mind to break it." Nor does it appear, nor can we infer, that he intended not to contribute any longer to her support, or that she understood that she was not to depend on him any longer. Under these circumstances, we cannot say that the relation of dependency had ceased at the time of his death. It is also urged that upon grounds of public policy Miss Judge is not entitled to the fund. But it was admitted at the argument on all hands that the relations between the two were entirely proper, and we fail to see any thing contrary to good morals or public policy in her claim to the fund.

The attempt of McCarthy to dispose of the fund by will, and to revoke the designation of Miss Judge as the beneficiary under the certificate, was wholly ineffectual. The by-laws of the defendant corporation pointed out the mode in which the beneficiary was to be changed (if at all), and that mode was not followed. Another beneficiary could be substituted only in the manner there provided. *Daniels v. Pratt*, 143 Mass. 216; 10 N. E. Rep'r, 166; *Elsev v. Association*, 142 Mass. 224; 7 N. E. Rep'r, 844. We think, therefore, that Sarah J. Judge, the person named in the certificate, is entitled to the fund. Decree for Sarah J. Judge.*

MUTUAL BENEFIT SOCIETIES—RECENT DECISIONS.

1. *Assessments* — *mandamus* to compel second assessment. — Where the by-laws of a mutual benefit association provide that its members shall be subject to but one assessment for each death loss, and one assessment is made from which only part of the amount due on a certificate is paid, *mandamus* will not lie to compel the levy of another assessment in order to pay the bal-

* Reported in 28 N. E. Rep'r, 866; 153 Mass. 314.

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ance, and it is immaterial in that regard whether the first assessment was sufficient to have paid the claim in full or not. *People, ex rel. Meyers, v. Masonic Guild, etc., Assn.*, 126 N. Y. 615; 27 N. E. Rep'r, 1087.

2. *Assessments—forfeiture for non-payment—notice.*—The members of the order were required, by its constitution, to pay specified assessments on the death of a member, for the maintenance of the beneficiary fund, and by neglect to make payment within a time specified a member *ipso facto* forfeited his rights under the beneficiary contract. Held, that notice of such assessments made upon members must be given to them before they could be deemed to be in default for non-payment. *Scheufler v. Grand Lodge, etc.*, 45 Minn. 256; 47 N. W. Rep'r, 799.

3. *Assessments notice a condition of forfeiture for non-payment.*—The constitution and by-laws of a mutual life association provided that the mortuary assessments upon the members should be made the first week-days of February, April, June, August, October and December, for such sum as was sufficient to meet the existing claims by death, and that a member failing to receive a notice of an assessment should notify the home office of that fact; and that a failure to pay the assessment within thirty days from the dates thereof should work a forfeiture of membership, but that a delinquent member might be reinstated within one year upon good cause shown, satisfactory evidence of good health, and payment of all back dues. Plaintiff's certificate stipulated that it was subject to the constitution and by-laws, and provided that "a notice addressed to a member at his post-office address, as appearing upon the books of the association, * * * shall be deemed a sufficient notice." The certificate was to become void if any of the payments provided for were not made "when due." The holder of a certificate failed to pay a June assessment for more than thirty days, and plaintiff, the beneficiary, averred that no notice was mailed or received, while defendant alleged that it was. Held, that if no notice was mailed the certificate was not forfeited, and that the question whether the notice was mailed or not was properly submitted to the jury, under an instruction that, if it was, they must find for defendant. *Mutual Reserve Fund Life Assn. v. Hamlin*, 189 U. S. 297; 11 Sup. Ct. Rep'r, 614. The duty imposed upon the insured to inform the company of his failure to receive notice of an assessment was not made a condition of the contract, the non-performance of which would cause a forfeiture of membership. *Ibid.*

4. *Assessments—payment by check sent through the mails—delay—forfeiture.*—A certificate provided that, if any assessment should not be paid within ten days after notice thereof, at the office of the company in Cincinnati, Ohio, the certificate should be void. The assured, who lived in Watertown, N. Y., was notified by mail that an assessment was due, and the notice contained the following: "Assessments are payable at this office in cash, by sight draft on Cincinnati or New York banks, money order, or American or U. S. Express Company money order, payable to," secretary. The assured, however, had already paid fifteen separate assessments by mailing his check, and no objection had been made thereto; and in this instance he mailed his check early enough to reach Cincinnati in regular course of mail before the expiration of the ten days, but it was not received in time. Held, that the jury were warranted in finding that this method had been acquiesced in by the company, and that

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the certificate was not forfeited. *Kenyon v. Knight Templar & M. Mut. Aid Assn.*, 123 N. Y. 247; 25 N. E. Rep'r, 299.

5. *Beneficiaries — change of.*—Where the by-laws of a mutual benefit association provide that the beneficiary in any certificate may be changed by its surrender and the payment of a fee, whereupon a new certificate would issue to the new beneficiary, a mere indorsement on a certificate by the holder thereof directing payment to one other than the beneficiary named therein is not sufficient to entitle such other to receive the benefit. *Jinks v. Banner Lodge*, 139 Penn. St. 414; 31 Atl. Rep'r, 4.

6. *Same.*—A provision in a certificate of membership in a mutual benefit association, empowering the member to change the beneficiary by "writing filed with the association," is substantially complied with by the member's written request, filed with the association, to substitute his executors, named in a will of a designated date, for the beneficiary named in the certificate, and an indorsement by the secretary on the certificate making the change. *Bowman v. Moore*, 87 Cal. 306; 25 Pac. Rep'r, 409.

7. *Beneficiaries — effect of subsequent by-laws as to persons entitled to benefits.*—A member of a mutual aid association directed, in accordance with its laws, that a benefit of \$1,000 on his death should be paid to his uncle and aunt. He afterward married. A subsequent amendment of the laws of the association provided that such benefit should be paid, on the decease of a member—First to the widow; second, to the children, if there be no widow; third, to the parents, if there be no widow or children; and empowered a member to designate any beneficiary; provided, that he must leave at least one-half thereof to the widow, if there be one, and, if not, then at least one-half to the children, if any. The member thereafter died, leaving a widow, without having made any other designation. Held, that the widow took the whole fund, as the designation could not operate, under the laws as amended, not even to cut down her right to one-half of the fund. *Sanger v. Rothschild*, 123 N. Y. 577; 26 N. E. Rep'r, 3.

8. *Forfeiture — misrepresentation.*—An application for an insurance certificate contained the following questions and answers: "State precise nature of business? Importer and wholesale dealer in wines and liquors. Is the person engaged in any way in the retailing of alcoholic liquors? No; keep no bar, and sell only at wholesale; have government license and town license." The government license gave permission to sell in quantities not less than five gallons, while the town license allowed sales in quantities less than five gallons, but not to be drunk on the premises. It appeared that the applicant sold by the pint, quart and bottle, as well as in large quantities, but not to be drunk on the premises. Held, that the question whether the answers in the application covered such sales was for the jury. *Kenyon v. Knights Templar & M. Mut. Aid Assn.*, 123 N. Y. 247; 25 N. E. Rep'r, 299.

9. *Forfeiture — misrepresentation — waiver of condition.*—The by-laws of a mutual beneficiary association organized under Statute Massachusetts 1877, chapter 204, section 1 (Pub. St., chap. 115, §§ 2, 8), provided that only male Roman Catholics between the ages of twenty and fifty-one years were eligible to membership. The application of decedent which designated plaintiff as his beneficiary described him as about forty-nine years old, when in fact he was over fifty-one years old. Held, that even if the officers of the

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corporation attempted to waive the condition as to age they could not do so. *McCoy v. Roman Catholic Mut. Ins. Co.*, 153 Mass. 272; 35 N. E. Rep'r. 392.

10. *Forfeiture*—effect of application for reinstatement.—Where it is claimed that a member has forfeited his rights for non-payment of assessments, the fact that he made application for reinstatement to membership cannot be regarded as a waiver of his rights as a member, when in fact his membership was not forfeited by his failure to pay the assessment, since no notice of it was mailed him. *Mutual Reserve Fund Life Assn. v. Hamlin*, 129 U. S. 297; 11 Sup. Ct. Rep'r, 614.

11. *Funeral benefit*—member in arrears.—Under the constitution of a mutual benefit society which provides that a member shall be entitled to funeral benefits if he is "not more than three months' dues in arrears at the time of his death," a member whose dues are in arrears for three months, and who dies the day before the dues for the following month are payable, is entitled to funeral benefits. *Sherry v. Operative Plasterers' Mut. Union*, 129 Penn. St. 470; 20 Atl. Rep'r, 1062.

12. *Proof*—burden of.—Where the plaintiff alleges generally a compliance with the terms of the policy, and the defense is a breach of a condition avoiding the policy, the burden of proving the breach is upon the defendant. *Scheufler v. Grand Lodge, etc.*, 45 Minn. 256; 47 N. W. Rep'r, 739.

CENTRAL TRANSPORTATION CO. V. PULLMAN PALACE-CAR CO.

(Supreme Court of the United States, March 2, 1886.)

1. *CORPORATIONS. LEASE OF ENTIRE PROPERTY. ULTRA VIRES.* A corporation chartered "for the transportation of passengers in railroad cars, constructed and to be owned by said company," under certain patents, and empowered to enter into contracts with other corporations "for the leasing or hiring and transfer to them" of their railway cars and other personal property, leased for a certain rental, for ninety-nine years, to another corporation in the same business, all its property, including its cars and patents, and all contracts with railroad companies for the hire of its cars, and agreed that while the lease was in force it would not engage in the business of manufacturing and using or hiring cars. Held, that the corporation was *quasi* public, and the lease was void as *ultra vires*, and because it was an abandonment by the lessor of its duty to the public.

2. *CONTRACTS IN RESTRAINT OF TRADE.* The above contract is also void as being an unreasonable restraint of trade. *Quare*.

3. *ENTROPPEL TO SET UP ULTRA VIRES.* The performance of such contract by the lessor, and use of the demised property by the lessee, cannot estop the lessee from setting up its invalidity in an action on the contract.

IN ERROR to the circuit court of the United States for the eastern district of Pennsylvania.

This was an action of covenant, brought September 21, 1886,

by the Central Transportation Company, a corporation of Pennsylvania, against Pullman's Palace-Car Company, a corporation of Illinois, to recover the sum of \$198,000 due for the last three-quarters of the year ending July 1, 1886, according to the terms of an indenture of lease from the plaintiff of all its personal property to the defendant, dated February 17, 1870, and set forth in full in the declaration. The defendant filed several pleas, one of which was "that said indenture of lease was void in law as between the parties thereto, for the want of authority and corporate power on the part of the parties thereto to make and enter into said indenture of lease; and for that the same was in excess and in violation of the charters conferring the corporate powers on said plaintiff, and of the purpose of their incorporation."

The plaintiff filed a replication, traversing the averments of this plea. The plaintiff was originally incorporated December 26, 1862, by a certificate or charter, made, acknowledged, recorded, and filed in the office of the secretary of the commonwealth, as required by the general laws of Pennsylvania, which authorized companies to incorporate themselves, by voluntary act of the associates, "for the purpose of carrying on the manufacture of woolen, cotton, flax, or silk goods, or of iron, paper, lumber or salt," or "for the manufacture of articles from iron and other metals, or out of wood, iron, and other metals," within the state, for a term not exceeding twenty years; and provided that every corporation so formed might by its corporate name purchase, hold and convey real or personal property, "necessary or convenient to enable the said company to carry on the business or operations named in such certificate;" and that its stock, property and affairs should be managed by a board of directors, a majority of whom in all cases should be stockholders therein and citizens of the state; and authorized the directors, subject to the revision and approval of the stockholders, to make such by-laws for the management and disposition of its stock and affairs, "and for carrying on all kinds of business within the object and purposes of such company;" and forbade the company to use any part of its capital stock or other funds in the purchase of stock in any other corporation. St. Pa., April 7, 1849, No. 368, §§ 1, 3, 4, 8; Id., April 1, 1853, No. 186, § 2. In accordance with the requirements of those statutes, the plaintiff's certificate of incorporation

or charter stated the object for which it was formed, "the transportation of passengers in railroad cars constructed and to be owned by the said company in accordance with the several letters patent," four in all, described by numbers and dates; the place where its chief operations were to be carried on, Philadelphia; the amount of its capital stock, \$200,000; and its term of continuance, twenty years, the extreme limit allowed by the statutes. By a special act of the legislature of Pennsylvania of February 9, 1870, No. 94, entitled "An act to extend the charter of the Central Transportation Company, to empower them to lease their property and increase their capital stock," the plaintiff's charter was extended for ninety-nine years from its expiration; and "said company are hereby empowered to enter into contracts with corporations of this or any other state for the leasing or hiring and transfer to them, or any of them, of the railway cars and other personal property," as well as "to increase their present capital stock \$200,000." On February 17, 1870, eight days after the passage of that act, the indenture sued on was made by and between the plaintiff and the defendant, which had been incorporated three years before, with a capital stock of \$100,000, by a special act of the legislature of Illinois of February 22, 1867 (declared to be a public act), "to manufacture, construct and purchase railway cars, with all convenient appendages and supplies for persons traveling therein, and the same" to "sell or use, or permit to be used, in such manner and upon such terms as the said company may think fit and proper."

The indenture, after the statement of the names of the parties, began with the following recitals: "Whereas, the parties hereto are engaged in the business of manufacturing railway cars, generally known as sleeping-cars, under certain patents belonging to them, respectively, and of hiring the same to railroad companies under written contracts, to be used and employed on and over the lines of the road of said railroad companies, and receiving therefor income and revenue by the sale to passengers of the berths and accommodations therein; and whereas, the demands of the public for increased means of personal comfort and convenience in traveling, of avoiding repeated changes of cars over long routes of railroad, the necessity for affording, at fair and reasonable rates, these advantages, which cannot be extended by railroad

companies themselves, require that every possible means should be adopted to meet such demands by avoiding the inconvenience and curtailing the expenses incidental to the maintenance of the business management and organization of two separate corporations." It further recited that the parties (professing to act under the powers conferred upon them, respectively, by the special acts of the legislatures of Pennsylvania and of Illinois, above mentioned) had agreed that the plaintiff should demise, transfer and set over to the defendant, and the defendant should take, all the plaintiff's railway cars, contracts, patent-rights and personal property. By that indenture, accordingly, the plaintiff "granted, demised, transferred and set over" one hundred and nineteen railway sleeping-cars, with their equipment, its contracts with sixteen railroad companies (copies of which were annexed to and made parts of the indenture), all its patent-rights (an assignment of which, including the four specified in its charter and thirteen others, was also annexed to the indenture and made part thereof), and all its personal property, rights, credits, moneys and effects, rights of action, money due and to become due from licenses heretofore granted," to the defendant, its successors and assigns, "to have and to hold the above-demised property, and all income, revenue and profit to be derived therefrom," for the term of ninety-nine years from January 1, 1870, except so far as the contracts, patents and licenses should expire sooner; and the plaintiff expressly covenanted that it would use its influence to obtain renewals or new contracts in the defendant's name from the railroad companies; and that "it shall and will not engage in the business of manufacturing, using or hiring sleeping-cars" while the indenture should remain in force. The defendant, on its part, covenanted to pay to the plaintiff annually the sum of \$264,000, in equal quarterly installments, "during the entire term of ninety-nine years," unless, upon a diminution of the revenue received from the railroad companies, the indenture should be declared void by the defendant, or the annual sums payable by the defendant be reduced, as therein provided; also to pay all the plaintiff's debts up to January 1, 1870, according to a schedule annexed, by which they were not to exceed the sum of \$63,998.69, that being the amount of cash transferred by the plaintiff to the defendant; to continue

and carry on the business as authorized by its charter, during the existence of the assigned contracts or other like contracts with the same railroad companies; to keep in repair the cars and their equipment, and to renew and reconstruct them when needful; not to assign the indenture without the plaintiff's assent, nor to create any lien or mortgage upon the property that should impair the plaintiff's rights under the indenture; that, upon the defendant's failure to make any quarterly payment for thirty days after due, the plaintiff might avoid the indenture, and thereupon the defendant should surrender the cars and equipment, assign to the plaintiff the contracts with the railroad companies and any unexpired patent-rights, and cease to run or employ cars on the same lines of railroad; and, at the end of the ninety-nine years, to deliver to the plaintiff the cars and equipment in good order, and assign to the plaintiff any unexpired contracts with those railroad companies.

At the trial, in May, 1888, the plaintiff offered in evidence its original charter, the statute of Pennsylvania of February 9, 1870, and the indenture of February 17, 1870, as well as evidence tending to show that the defendant, under that indenture, entered into possession of the plaintiff's property, and continued in possession during the period covered by the declaration. To the admission of all this evidence the defendant objected, "on the ground that it was beyond the power of either corporation to make the contract; and also because it was null and void by reason of its being in restraint of trade, and against public policy as preventing competition." The court sustained the objection, and excluded the evidence, and the plaintiff excepted. The plaintiff then offered to prove, in addition to the above evidence, that in pursuance of the indenture of February 17, 1870, the plaintiff's cars, contracts, and patent-rights were delivered to the defendant, and continued in its possession under the indenture, and the defendant insisted on retaining them until July 1, 1886, and the defendant then for the first time tendered them to the plaintiff, and declared the indenture void, in accordance with its provisions. The defendant objected to this evidence; the court sustained the objection, and excluded the evidence; and the plaintiff excepted. The defendant thereupon moved for a nonsuit, and the court granted the motion, and ordered a nonsuit, and refused a motion of the

plaintiff to take it off; and the plaintiff again excepted. A judgment of nonsuit was entered accordingly, and the plaintiff tendered a bill of exceptions, which was allowed by the court, and sued out this writ of error.

J. G. Johnson for plaintiff in error. *Edw. S. Isham* and *Wayne Mac Veagh* for defendant in error.

Mr. Justice GRAY, after stating the case as above, delivered the opinion of the court.

The principal defense in this case, duly made by the defendant, by formal plea, as well as by objection to the plaintiff's evidence, and sustained by the circuit court, was that the indenture of lease sued on was void in law, because beyond the powers of each of the corporations by and between whom it was made. There is a preliminary question of practice, arising out of the manner in which the case was disposed of below, which is deserving of notice, although not mentioned by counsel in argument. The circuit court, in ordering a nonsuit because in its opinion the evidence offered by the plaintiff was insufficient in law to maintain the action, acted in accordance with the statute of Pennsylvania, which provides that "it shall be lawful for the judge presiding at the trial to order a judgment of nonsuit to be entered, if in his opinion the plaintiff shall have given no such evidence as in law is sufficient to maintain the action, with leave, nevertheless, to move the court *in banc* to set aside such judgment of nonsuit; and, in case the said court *in banc* shall refuse to set aside the nonsuit, the plaintiff may remove the record by writ of error into the supreme court for revision and review, in like manner and with like effect as he might remove a judgment rendered against him upon a demurrer to evidence." St. Pa., March 11, 1836, § 7; Id., March 11, 1875, § 1; 2 Purd. Dig. (11th ed.), pp. 1362, 1363. Under that statute, as expounded by Chief Justice Gibson, the judge can order a nonsuit, only when all the evidence introduced, with every inference of fact that a jury might draw from it in favor of the plaintiff, appears to be insufficient in matter of law to sustain a verdict; and the defendant's motion for a nonsuit is equivalent to a demurrer to evidence, differing only in the judgment thereon not being a final determination of the rights of the parties, for if it is

in favor of the plaintiff the case must be submitted to the jury, and if in favor of the defendant it is no bar to a new action. *Smyth v. Craig*, 3 Watts & S. 14; *Fleming v. Insurance Co.*, Brightly N. P. 102; *Bournonville v. Goodall*, 10 Penn. St. 133. It is true that a plaintiff, who appears by the record to have voluntarily become nonsuit, cannot sue out a writ of error. *U. S. v. Evans*, 5 Cranch, 280; *Evans v. Phillips*, 4 Wheat. 73; *Cossar v. Reed*, 17 Q. B. 540. But in the case of a compulsory nonsuit it is otherwise; and a plaintiff, against whom a judgment of nonsuit has been rendered without his consent and against his objection, is entitled to relief by writ of error. *Elmore v. Grymes*, 1 Pet. 469; *Strother v. Hutchinson*, 4 Bing. N. C. 83; 5 Scott, 346; 6 Dow. 238; *Voorhees v. Coombs*, 33 N. J. Law, 482. There are many cases in the books in which this court has held that a court of the United States had no power to order a nonsuit without the plaintiff's acquiescence. *Elmore v. Grymes*, above cited; *Crane v. Morris*, 6 Pet. 598, 609; *Silsby v. Foote*, 14 How. 218; *Castle v. Bullard*, 23 How. 172, 183. Yet, instead of overruling, upon that ground alone, exceptions to a refusal to order a nonsuit, this court, more than once, has considered and determined questions of law upon the decision of which the nonsuit was refused in the court below. *Crane v. Morris* and *Castle v. Bullard*, above cited.

The difference between a motion to order a nonsuit of the plaintiff and a motion to direct a verdict for the defendant is, as observed by Mr. Justice Field, delivering a recent opinion of this court, "rather a matter of form than of substance, except [that] in the case of a nonsuit a new action may be brought, whereas in the case of a verdict the action is ended, unless a new trial be granted, either upon motion or upon appeal." *Oscanyan v. Arms Co.*, 103 U. S. 261, 264. Whether a defendant in an action at law may present in the one form or in the other, or by demurrer to the evidence, the defense that the plaintiff, upon his own case, shows no cause of action, is a question of "practice, pleadings and forms and modes of proceeding," as to which the courts of the United States are now required by the act of congress of June 1, 1872, chapter 255, section 5 (17 St. 197), re-enacted in section 914 of the Revised Statutes, to conform, as near as may be, to those existing in the courts of the state within which the trial is had. *Sawin v. Kenny*, 93 U. S. 289; *Ex parte Boyd*,

105 U. S. 647; Chateaugay Ore, etc., Co., Petitioner, 128 U. S. 544; 9 Sup. Ct. Rep'r, 150; Glenn v. Summer, 132 U. S. 152, 156; 10 Sup. Ct. Rep'r, 41.

It is doubtless within the authority of the presiding judge, and is often more convenient, in order to prevent the case from being brought up in such a form that the judgment of the court of last resort will not finally determine the rights of the parties, to adopt the course of directing a verdict for the defendant and entering judgment thereon. But the judgment of nonsuit, being a final judgment disposing of the particular case, and rendered upon a ruling in matter of law duly excepted to by the plaintiff, is subject to be reviewed in this court by writ of error. It was, therefore, rightly assumed by the counsel of both parties at the argument that the only question to be determined is of the correctness of the ruling sustaining the defense of *ultra vires*, independently of the form in which that question was presented and disposed of. Upon the authority and the duty of a corporation to exercise the powers granted to it by the legislature, and those only, and upon the invalidity of any contract, made beyond those powers, or providing for their disuse or alienation, there is no occasion to refer to decisions of other courts, because the judgments of this court, especially those delivered within the last twelve years by the late Mr. Justice Miller, afford satisfactory guides and ample illustrations.

The earliest case in this court which touches the subject is Railroad Co. v. Winans, decided at December term, 1854, in which a railroad corporation unsuccessfully tried to escape liability for an unlicensed use of the plaintiff's patent in cars run over its road, upon the ground that the cars were constructed, owned and used by another corporation under a contract with the defendant. Mr. Justice Campbell, delivering judgment, said: "Important franchises were conferred upon the corporation to enable it to provide the facilities to communication and intercourse required for the public convenience. Corporate management and control over these were prescribed, and corporate responsibility for their insufficiency provided, as a remuneration to the community for their grant. The corporation cannot absolve itself from the performance of its obligations, without the consent of the legislature." 17 How. 30, 39.

In Pearce v. Railroad Co., at December term, 1858, it was

adjudged that two corporations, chartered by the state of Indiana to construct and manage distinct, though connecting, railroads, had no power to consolidate themselves into one corporation, or to establish a connecting steamboat line on the Ohio river, and, therefore, were not liable to be sued upon a promissory note which they had given in payment for a steamboat. The same justice, in delivering the opinion of the court, stated the reasons for the decision as follows: "The rights, duties and obligations of the defendants are defined in the acts of the legislature of Indiana under which they were organized, and reference must be had to these, to ascertain the validity of their contracts. They empower the defendants, respectively, to do all that was necessary to construct and put in operation a railroad between the cities which are named in the acts of incorporation. There was no authority of law to consolidate these corporations, and to place both under the same management, or to subject the capital of the one to answer for the liabilities of the other; and so the courts of Indiana have determined. But, in addition to that act of illegality, the managers of these corporations established a steamboat line to run in connection with the railroads, and thereby diverted their capital from the objects contemplated by their charters, and exposed it to perils for which they afforded no sanction. Now, persons dealing with the managers of a corporation must take notice of the limitations imposed upon their authority by the act of incorporation. Their powers are conceded in consideration of the advantage the public is to receive from their discreet and intelligent employment, and the public have an interest that neither the managers nor stockholders of the corporations shall transcend their authority." 21 How. 441-443.

In *Zabriskie v. Railroad Co.*, at December term, 1859, this court, again speaking by the same justice, while affirming and acting on the principle that a corporation may be bound by the conduct and representations of its directors in "those cases in which a corporation acts within the range of its general authority, but fails to comply with some formality or regulation which it should not have neglected, but which it has chosen to disregard," took the precaution to observe: "This principle does not impugn the doctrine that a corporation cannot vary from the object of its creation, and that persons dealing with a company must take no-

tice of whatever is contained in the law of their organization. This doctrine has been constantly affirmed in this court." 23 How. 381, 398.

In *Thomas v. Railroad Co.*, 101 U. S. 71, decided at October term, 1879, it was adjudged that a lease for twenty years by a railroad corporation of its railroad, rolling stock and franchises, in consideration of being paid one-half of the gross sums collected from the operation of the road by the lessees during the term, and reserving to the lessor a right to terminate the lease and retake possession of the road at any time, paying to the lessees the value of the unexpired term, was void; and that the corporation, upon terminating the lease and resuming possession when the lessees had been in possession five years, and the accounts of the parties for those years had been adjusted and paid, was not liable to an action by the lessees to recover the value of the unexpired term; and Mr. Justice Miller, in the course of delivering judgment, said: "The authority to make this lease is placed by counsel primarily in the following language of the thirteenth section of the company's charter: 'That it shall be lawful for the said company, at any time during the continuance of its charter, to make contracts and engagements with any other corporation, or with individuals, for the transporting or conveying any kinds of goods, produce, merchandise, freight or passengers, and to enforce the fulfillment of such contracts.' This is no more than saying: 'You may do the business of carrying goods and passengers, and may make contracts for doing that business. Such contracts you may make with any other corporation or with individuals.' No doubt a contract by which the goods, received from railroad or other carrying companies, should be carried over the road of this company, or by which goods or passengers from this road should be carried by other railroads, whether connecting immediately with them or not, are within this power, and are probably the main object of the clause. But it is impossible, under any sound rule of construction, to find in the language used a permission to sell, lease or transfer to others the entire road, and the rights and franchises of the corporation. To do so is to deprive the company of the power of making those contracts which this clause confers, and of performing the duties which it implies." *Id.* 80. "The authority to build a railroad, and to contract for carrying passengers and

goods over it and other roads, is no authority to lease it, and with the lease to part with all its powers to another company or to individuals." Id. 81. "The powers of corporations organized under legislative statutes are such, and such only, as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is a measure of its powers, and that the enumeration of these powers implies the exclusion of all others." Id. 82. "There is another principle of equal importance, and equally conclusive against the validity of this contract, which, if not coming exactly within the doctrine of *ultra vires* as we have just discussed it, shows very clearly that the railroad company was without the power to make such a contract. That principle is that where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes, without the consent of the state, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the state, and is void, as against public policy." Id. 83. It was also held in that case that the lease was not made valid by a subsequent act of the legislature, regulating the rates of fares and freights to be charged by "the directors, lessees or agents of said railroad," the court saying: "It is not by such an incidental use of the word 'lessees,' in an effort to make sure that all who collected fares should be bound by the law, that a contract unauthorized by the charter, and forbidden by public policy, is to be made valid, and ratified by the state." Id. 85.

In *Branch v. Jessup*, Mr. Justice Bradley, delivering judgment, said: "Generally, the power to sell and dispose has reference only to transactions in the ordinary course of business incident to a railroad company; and does not extend to the sale of the railroad itself, or of the franchises connected therewith. Outlying lands, not needed for railroad uses, may be sold. Machinery and other personal property may be sold. But the road and franchises are generally inalienable; and they are so, not only because they

are required by legislative grant, or in the exercise of special authority given, for the specific purposes of the incorporating act, but because they are essential to the fulfillment of those purposes; and it would be a dereliction of the duty owed by the corporation to the state and to the public to part with them." And a lease from one railroad corporation to another was upheld in that case, only because the lessor had by its charter express authority, not only to purchase, hold and convey property, real and personal, and to connect its road with any other road, but also to incorporate its stock with that of any other company, which, it was observed, "contemplates not only the possible transfer of the railroad and its franchises to another company, but even the extinguishment of the corporation itself, and its absorption into a different organization. The greater power of alienating or extinguishing all its franchises, including its own being and existence, contains the lesser power of alienating its road, and the franchises incident thereto, and necessary to its operation. Its power of alienation and sale extends to a class of subjects to which it does not ordinarily apply." 106 U. S. 468, 478, 479; 1 Sup. Ct. Rep'r, 495.

In *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, the same principles were reaffirmed; and the court, again speaking through Mr. Justice Miller, after referring to some of the previous decisions on the subject in this and other courts, stated, "as the just result of these cases and on sound principle, that unless specially authorized by its charter, or aided by some other legislative action, a railroad company cannot, by lease or any other contract, turn over to another company, for a long period of time, its road and all its appurtenances, the use of its franchises, and the exercise of its powers; nor can any other railroad company, without similar authority, make a contract to receive and operate such road, franchises and property of the first corporation; and that such a contract is not among the ordinary powers of a railroad company, and is not to be presumed from the usual grant of powers in a railroad charter." In that case it was held that a lease for ninety-nine years of a railroad in Illinois and Indiana from a railroad corporation of Illinois to a railroad corporation of Indiana, whose road connected with the road leased, was within the authority conferred on the lessor by the statute of Illinois, which empowered all railroad corporations of that state to make "contracts

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and arrangements with each other, and with railroad corporations of other states, for leasing or running their roads, or any part thereof ;" yet was unlawful and void, because beyond the authority conferred upon the lessee by the statute of Indiana, empowering any railroad corporation of that state, whose road connected with a railroad in an adjoining state, "to make such contracts and agreements with any such road constructed in an adjoining state, for the transportation of freight and passengers, or for the use of its said road, as to the board of directors may seem proper ;" the court saying that it could not "see in this provision any authority to make contracts beyond those which relate to forwarding by one company the passengers and freight of another, on terms to be agreed on, and possibly for the use of the road of one company in running the cars of the other over it to its destination without breaking bulk." 118 U. S. 290, 309, 312, 630 ; 6 Sup. Ct. Rep'r, 1094 ; 7 Sup. Ct. Rep'r, 24. In another case, decided about the same time, the same justice, in delivering an opinion by which a corporation was held to be liable for a tort done by its agents in the course of its business and of their employment, although in excess of its powers, observed : "The question of the liability of corporations on contracts which the law does not authorize them to make, and which are wholly beyond the scope of their powers, is governed by a different principle. Here the party dealing with the corporation is under no obligation to enter into the contract. No force or restraint or fraud is practiced on him. The powers of these corporations are matters of public law, open to his examination, and he may and must judge for himself as to the power of the corporation to bind itself by the proposed agreement." *Salt Lake City v. Hollister*, 118 U. S. 256, 263 ; 6 Sup. Ct. Rep'r, 1055.

In *Willamette Woolen Manuf'g Co. v. Bank of British Columbia*, 119 U. S. 191 ; 7 Sup. Ct. Rep'r, 187, cited for the plaintiff, a corporation chartered "for the purpose of creating and improving water-power and privileges," and authorized to bring water from a river, was also expressly authorized by its charter to "use, rent or sell" "the exclusive right to the hydraulic power and privileges created by the water" so taken, and for that reason only was held by this court, speaking by the same justice, to have the power to mortgage such right, power and privileges. In *Green*

Bay & M. R. Co. v. Union Steamboat Co., 107 U. S. 98; 2 Sup. Ct. Rep'r, 221, and in Pittsburgh, etc., Ry. Co. v. Keokuk & H. Bridge Co., 131 U. S. 371, 384; 9 Sup. Ct. Rep'r, 770, the general doctrine of *ultra vires*, as established by earlier decisions, was affirmed; and a railroad corporation was held to have the power, for the purpose of securing a continuous line of transportation of which its road formed part, to make a contract with a steamboat company, or with a company chartered to construct a railway bridge or viaduct, because the charter of the particular railroad corporation, read in connection with the general laws applicable to it, clearly manifested the intention of the legislature to confer upon it that power.

In Oregon Ry., etc., Co. v. Oregonian Ry. Co., 130 U. S. 1; 9 Sup. Ct. Rep'r, 409, it was held that a general law of Oregon, authorizing companies to organize themselves by written articles of association filed with the secretary of state for "any lawful enterprise, business, pursuit, or occupation" specified in the articles, including "making or constructing any railroad," and "to purchase, possess and dispose of such real and personal property as may be necessary and convenient to carry into effect the object of the incorporation," did not authorize a railroad corporation to be incorporated, either for leasing its railroad to another corporation, or for taking leases from other corporations of their roads, although these objects were included in its articles of association; and therefore that, without further and express authority from the legislature, a lease for ninety-six years from one railroad corporation of its whole road and franchises to another such corporation was utterly void, and would not sustain an action by the lessor against the lessee to recover the rent stipulated in the lease. It was also held in that case, in accordance with the decision in Thomas v. Railroad Co., that no authority to make such a lease could be implied from a special act passed by the Oregon legislature before the lease, granting to the plaintiff corporation rights, privileges and easements, for wharves, stations and tracks, in certain public grounds and streets; with a proviso that said corporation "or its assigns" should have no power to sell, convey, or assign the rights so granted to any person or corporation, save only with and as part of its railway; and the reasons for so holding appear in the following extracts from the opinion of the court,

delivered by Mr. Justice Miller : "One of the most important powers with which a corporation can be invested is the right to sell out its whole property, together with the franchises under which it is operated, or the authority to lease its property for a long term of years. In the case of a railroad company, these privileges, next to the right to build and operate its railroad, would be the most important which could be given it, and this idea would impress itself upon the legislature. Naturally, we would look for the authority to do these things in some express provision of law. We would suppose that, if the legislature saw fit to confer such rights, it would do so in terms which could not be misunderstood. To infer, on the contrary, that it either intended to confer them or to recognize that they already existed, by the simple use of the word 'assigns,' a very loose and indefinite term, is a stretch of the power of the court in making implications which we do not feel to be justified." 130 U. S. 30; 9 Sup. Ct. Rep'r, 415. "The object of the legislature in making the proviso to that statute was to make sure that the grant given to the Oregonian Company of 'terminal facilities,' as they are called, with the right to wharves, depots and access to the river for the use of the road, should never be separated by sale, assignment or otherwise from the road itself, and that into whosoever hands the road went should also go the rights, powers and privileges conveyed by the grant." 130 U. S. 32; 9 Sup. Ct. Rep'r, 415, 416. It was further held that a provision of the general laws of Oregon, authorizing any corporation, by a vote of a majority of its stockholders, to dissolve itself, and thereupon to settle its business, dispose of its property, and divide its capital stock, did not confer upon it any authority, while continuing in existence, to dispose of by conveyance or lease its road and its corporate powers and franchises. 130 U. S. 34, 35; 9 Sup. Ct. Rep'r, 416, 417.

The clear result of these decisions may be summed up thus: The charter of a corporation, read in the light of any general laws which are applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental. All contracts made by a corporation beyond the scope of those powers are unlawful and void, and no action can be maintained upon them in the courts, and this upon three distinct grounds: The obligation of every one contracting with a corpora-

tion to take notice of the legal limits of its powers; the interest of the stockholders, not to be subjected to risks which they have never undertaken; and, above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law. A corporation cannot, without the assent of the legislature, transfer its franchise to another corporation, and abnegate the performance of the duties to the public, imposed upon it by its charter as the consideration for the grant of its franchise. Neither the grant of a franchise to transport passengers, nor a general authority to sell and dispose of property, empowers the grantee, while it continues to exist as a corporation, to sell or to lease its entire property and franchise to another corporation. These principles apply equally to companies incorporated by special charter from the legislature, and to those formed by articles of association under general laws.

By a familiar rule, every public grant of property, or of privileges or franchises, if ambiguous, is to be construed against the grantee, and in favor of the public; because an intention, on the part of the government to grant to private persons, or to a particular corporation, property or rights in which the whole public is interested, cannot be presumed, unless unequivocally expressed or necessarily to be implied in the terms of the grant; and because the grant is supposed to be made at the solicitation of the grantee, and to be drawn up by him or by his agents, and, therefore, the words used are to be treated as those of the grantee; and this rule of construction is a wholesome safeguard of the interests of the public against any attempt of the grantee, by the insertion of ambiguous language, to take what could not be obtained in clear and express terms. *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 544-548; *Railroad Co. v. Litchfield*, 23 How. 66, 88, 89; *Slidell v. Grandjean*, 111 U. S. 412, 437, 438; 4 Sup. Ct. Rep'r, 475. This rule applies with peculiar force to articles of association, which are framed under general laws, and which are a substitute for a legislative charter, and assume and define the powers of the corporation by the mere act of the associates, without any supervision of the legislature or of any public authority. *Oregon Ry., etc., Co. v. Oregonian Ry. Co.*, 130 U. S. 26, 27; 9 Sup. Ct. Rep'r, 413, 414.

In the case at bar, the plaintiff was originally incorporated for twenty years from December 26, 1862, with a capital stock of

\$200,000, by articles of association, called a certificate or charter, under general laws of Pennsylvania. It is not without significance that those laws required its stock, property and affairs to be managed by a board of directors, a majority of whom should be stockholders therein, and citizens of the state; and forbade it to use any part of its capital stock in the purchase of stock in any other corporation. Those laws related to manufacturing companies only. But the purpose of its incorporation, as stated in that charter, was "the transportation of passengers in railroad cars constructed and to be owned by the said company" under certain patents. And, as appears by the recitals in the indenture sued on, the plaintiff carried on the business of manufacturing sleeping-cars under its patents and of hiring or letting these cars to railroad companies by written contracts, receiving a revenue from the sale of berths and accommodations to passengers.

The validity of the plaintiff's incorporation, as well as its power to make that indenture, however, depends not solely upon the original charter and the general laws under which it came into existence, but mainly upon a special act of the legislature of Pennsylvania of February 9, 1870. By this act, the validity of the charter for the object therein named was clearly recognized; the charter was extended for ninety-nine years, nearly fivefold the period for which the corporation was or could have been formed under the general laws; and the corporation was expressly empowered to double its capital stock, and "to enter into contracts with corporations of this or any other state for the leasing or hiring and transfer to them, or any of them," of its "railway cars and other personal property." The plaintiff, therefore, was not an ordinary manufacturing corporation, such as might, like a partnership, or an individual engaged in manufactures, sell or lease all its property to another corporation. *Ardesco Oil Co. v. North American Oil, etc., Co.*, 66 Penn. St. 375; *Treadwell v. Manufacturing Co.*, 7 Gray, 393. But the purpose of its incorporation, as defined in its charter, and recognized and confirmed by the legislature, being the transportation of passengers, the plaintiff exercised a public employment and was charged with the duty of accommodating the public in the line of that employment, exactly corresponding to the duty which a railroad corporation or a steamboat company, as a carrier of passengers, owes to the

public, independently of possessing any right of eminent domain. The public nature of that duty was not affected by the fact that it was to be performed by means of cars constructed and of patent-rights owned by the corporation, and over roads owned by others. The plaintiff was not a strictly private, but a *quasi* public corporation; and it must be so treated as regards the validity of any attempt on its part to absolve itself from the performance of those duties to the public, the performance of which by the corporation itself was the remuneration that it was required by law to make to the public in return for the grant of its franchise. *Pickard v. Car Co.*, 117 U. S. 34; 6 Sup. Ct. Rep'r, 635; *Railroad Co. v. Winans*, 17 How. 30, 39; *Railroad Co. v. Lockwood*, 17 Wall. 357; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397; 9 Sup. Ct. Rep'r, 469.

The evident purpose of the legislature, in passing the statute of 1870, was to enable the plaintiff the better to perform its duties to the public, by prolonging its existence, doubling its capital, and confirming, if not enlarging, its powers. An intention that it should immediately abdicate those powers, and cease to perform those duties, is so inconsistent with that purpose that it cannot be implied, without much clearer expressions of the legislative will looking towards that end than are to be found in this statute. The provision of this statute, by which the plaintiff is empowered to contract with other corporations "for the leasing or hiring and transfer to them, or any of them," of its "railway cars and other personal property," is fully satisfied by construing it as confirming the plaintiff's right to do as it had been doing, to "lease" or "hire" (which are equivalent words) to other corporations in the regular course of its business, and to "transfer" under such leasing or hiring its "railway cars," and "other personal property," either connected with the cars, or at least of the same general nature of tangible property. It can hardly be stretched to warrant the plaintiff in making to a single corporation an absolute transfer, or a long lease, of all that might be comprehended in the words "personal property" in their widest sense, including not only goods and chattels, but moneys, credits and rights of action. In any view it would be inconsistent alike with the main purpose of the statute, and with the uniform course of decision in this court, to construe these words as authorizing the plaintiff to deprive

itself, either absolutely, or for a long period of time, of the right to exercise the franchise granted to it by the legislature for the accommodation of the public.

By the contract between these parties, as expressed in the indenture sued on, are transferred all cars already constructed, all existing contracts with railroad companies for running cars, also existing patent-rights under which other cars might be constructed, and all other personal property, moneys, credits and rights of action of the plaintiff. But after the cars and the railroad contracts may have ceased to exist, and after all those patent-rights must have expired, the indenture is still to continue in force for the full term of ninety-nine years, unless sooner terminated as therein provided. In addition to all this, the plaintiff covenants, in the most express and positive terms, never to "engage in the business of manufacturing, using or hiring sleeping-cars" while the indenture remains in force. In short, the plaintiff not only parts with all its means of carrying on the business, and performing the duty for which it had been chartered, of transporting passengers and making and letting cars to transport them in, but it undertakes to transfer, for ninety-nine years, nearly co-extensive with the duration of its own corporate existence, the whole conduct of its business, and the performance of all its public duties, to another corporation, and to continue in existence, during that period, for no other purpose than that of receiving, from time to time, from the other corporation the stipulated rent or compensation, and of making dividends out of the moneys so received. Considering the long term of the indenture, the perishable nature of the property transferred, the large sums to be paid quarterly by the defendant by way of compensation, its assumption of the plaintiff's debts, and the frank avowal, in the indenture itself, of the intention of the two corporations to prevent competition and to create a monopoly, there can be no doubt that the chief consideration for the sums to be paid by the defendant was the plaintiff's covenant not to engage in the business of manufacturing, using or hiring sleeping-cars; and that the real purpose of the transaction was, under the guise of a lease of personal property, to transfer to the defendant nearly the whole corporate franchise of the plaintiff, and to continue the plaintiff's existence for the single purpose of receiving compensation for not performing its duties.

The necessary conclusion from these premises is that the contract sued on was unlawful and void, because it was beyond the powers conferred upon the plaintiff by the legislature, and because it involved an abandonment by the plaintiff of its duty to the public.

There is strong ground, also, for holding that the contract between the parties is void, because in unreasonable restraint of trade, and, therefore, contrary to public policy. Of the cases cited by the plaintiff upon this point, those which have most resemblance to the present case are quite distinguishable. A covenant by the assignor of letters-patent for an invention, that he will not himself make, use or sell the patented article, is undoubtedly valid, because the act of congress which creates the monopoly especially authorizes it to be assigned as a whole. *Rev. St.*, §§ 4884, 4898; *Gayler v. Wilder*, 10 How. 477, 494; *Morse Co. v. Morse*, 103 Mass. 73. But this plaintiff's transfer and covenant, as we have seen, cover much more than patentrights, and are to continue in force long after the patent-rights assigned must have expired. Upon the sale of a secret process, a covenant, express or implied, that the seller will not use the process himself or communicate it to any other person, is lawful, because the process must be kept secret in order to be of any value, and the public has no interest in the question by whom it is used. *Fowle v. Park*, 131 U. S. 88, 97; 9 Sup. Ct. Rep'r, 658; *Vickery v. Welch*, 19 Pick. 523, 527; *Peabody v. Norfolk*, 98 Mass. 452, 460. A contract of a carrier, whether an individual or a corporation, not to carry passengers or goods over a particular route, may be reasonable and valid. *Pierce v. Fuller*, 8 Mass. 223; *Palmer v. Stebbins*, 3 Pick. 188; *Leslie v. Lorillard*, 110 N. Y. 519; 18 N. E. Rep'r, 363. But a contract by which a corporation, chartered to perform the duties of a common carrier, or any other duties to the public, agrees that it will not perform those duties at all, anywhere for ninety-nine years, is clearly unreasonable and void. *Navigation Co. v. Winsor*, 20 Wall. 64; *Gibbs v. Gas Co.*, 130 U. S. 396, 408-410; 9 Sup. Ct. Rep'r, 553. This case strikingly illustrates several of the obvious considerations for holding contracts in restraint of trade to be unreasonable and void, as compactly and forcibly stated by Mr. Justice Morton in the leading case of *Alger v. Thacher*: "They tend to deprive the public of the services of men in the employments and capacities in which they

may be most useful to the community as well as themselves." "They prevent competition and enhance prices." "They expose the public to all the evils of monopoly. And this especially is applicable to wealthy companies and large corporations, who have the means, unless restrained by law to exclude rivalry, monopolize business, and engross the market." 19 Pick. 51, 54. But this objection, as applied to the facts of this case, so closely connects itself with the objection more distinctly pleaded, and already discussed at length, that it requires no further separate consideration. The contract sued on being clearly beyond the powers of the plaintiff corporation, it is unnecessary to determine whether it is also *ultra vires* of the defendant because, in order to bind either party, it must be within the corporate powers of both. *Thomas v. Railroad Co., Pennsylvania R. Co. v. St. Louis, etc., R. Co., and Oregon Ry., etc., Co. v. Oregonian Ry. Co.*, above cited.

It was argued in behalf of the plaintiff that, even if the contract sued on was void, because *ultra vires* and against public policy, yet that, having been fully performed on the part of the plaintiff, and the benefits of it received by the defendant, for the period covered by the declaration, the defendant was estopped to set up the invalidity of the contract as a defense to this action to recover the compensation agreed on for that period. But this argument, though sustained by decisions in some of the states, finds no support in the judgments of this court. The passages cited by the plaintiff from *Railway Co. v. McCarthy*, 96 U. S. 258, 267, and *San Antonio v. Mehaffy*, 96 U. S. 312, 315, are no more than a passing remark that "the doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail when it would defeat the ends of justice, or work a legal wrong," and a repetition in substance, of the same remark, adding, "if such a result can be avoided."

In *Thomas v. Railroad Co.*, already cited, Mr. Justice Miller, while admitting in general terms that "in many instances, where an invalid contract, which the party to it might have avoided or refused to perform, has been fully performed on both sides, whereby money has been paid or property changed hands, the courts have refused to sustain an action for the property or the money so transferred," and that "the executed dealings of cor-

porations must be allowed to stand for and against both parties when the plainest rules of good faith require it," yet in the same connection, and in the most emphatic words, said that in the case before the court, of a contract forbidden by public policy and beyond the powers of the defendant corporation, it was its legal duty, a duty both to its stockholders and to the public, to rescind and abandon the contract at the earliest moment, and the performance of that duty, though delayed for several years, was a rightful act when done, and could give the other party no right of action; and that to hold otherwise would be "to hold that any act performed in executing a void contract makes all its parts valid, and that the more that is done under a contract forbidden by law the stronger is the claim to its enforcement by the courts." 101 U. S. 86.

In an earlier part of the same opinion, and again in *Oregon Ry., etc., Co. v. Oregonian Ry. Co.*, he referred with approval to the decision of the house of lords in *Iron Co. v. Riche, L. R., 7 H. L. 653*, by which, as he observed, "the broad doctrine was established that a contract not within the scope of the powers conferred on the corporation cannot be made valid by the assent of every one of the shareholders, nor can it by any partial performance become the foundation of a right of action." 101 U. S. 83; 130 U. S. 22; 9 Sup. Ct. Rep'r, 412.

In *Union Trust Co. v. Illinois Midland Ry. Co.*, 117 U. S. 434; 6 Sup. Ct. Rep'r, 809, after one railroad corporation had purchased of two others their connecting railroads and their franchises, a receiver had been appointed of all its property, including the three railroads, and, under the direction of the court, and without objection by any of the parties interested, had for years administered the whole as a unit, and incurred expenses and issued certificates accordingly. It was held that the holders of bonds secured by mortgage of one of the purchased railroads could not, for want of affirmative legislative authority for the sale and purchase of that road, claim a priority of lien upon it as against the holders of certificates issued by the receiver for necessary and proper expenses of the whole line; and this court, as declared in its opinion delivered by Mr. Justice Blatchford, rested this conclusion "on the principle that non-action on the part of the bondholders and their trustee, which allowed the court and the receivers to go on during the entire litigation, contracting

debts in respect to the whole line operated as a unit, and administering the property as one, under circumstances where, as shown, it was and is impossible to separate the interests, as to expenditures and benefits, in respect to the matters now questioned, and where important rights have accrued on the faith of the unity of the interests, amounts to such acquiescence as should operate as an estoppel." 117 U. S. 468, 469; 6 Sup. Ct. Rep'r, 828. The court, in that case, in no way maintained any suit on the contract supposed to be unlawful; but simply refused to set it aside at the demand of parties, by reason of whose silence, and omission to seasonably interpose any objection, it had been acted upon as valid throughout a long course of judicial proceedings. •

The distinction is clearly brought out in *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, above cited, in which it was argued, substantially as in the present case, that, although the contract of lease might be void, so that no action could originally have been maintained upon it, yet there had been for years such performance of it, in the use, possession and control by the defendants of the plaintiff's road and franchise, that they could not now be permitted to repudiate or abandon it; and that the case came within that class in which it had been held that, where a contract has been so far executed that property has passed and rights have been acquired under it, the courts will not disturb the possession of such property, or compel restitution of money received under such a contract. In answering that objection, Mr. Justice Miller, speaking for the court, said: "Undoubtedly there are such decisions in courts of high authority, and there is such a principle, very sound in its application to appropriate cases. But we understand the rule in such cases to stand upon the broad ground that the contract itself is void, and that neither what has been done under it, nor the action of the court, can infuse any vitality into it. Looking at the case as one where the parties have so far acted under such a contract that they cannot be restored to their original condition, the court inquires if relief can be given independently of the contract, or whether it will refuse to interfere as the matter stands." And whether, in the case then before the court, the lessee might be liable to the lessor, as on a *quantum meruit*, for the use of its road, was not decided, because not presented. 118 U. S. 316-318; 6 Sup. Ct. Rep'r, 1106, 1107.

In *Salt Lake City v. Hollister*, above cited, it was said that, in cases of contracts upon which corporations could not be sued because they were *ultra vires*, "the courts have gone a long way to enable parties, who had parted with property or money on the faith of such contracts, to obtain justice by recovery of the property or the money specifically, or as money had and received to the plaintiff's use." 118 U. S. 263; 6 Sup. Ct. Rep'r, 1059. The true ground of relief in such cases is clearly shown in a line of opinions, two of which were cited by Mr. Justice Miller in support of the proposition just quoted, in which municipal corporations, having received money or property, under contracts so far beyond their powers as not to be capable of being enforced or sued on according to their terms, have been held, while not liable to pay according to the contracts, to be bound to account for the money or property which they had received.

Thus, in *Hitchcock v. Galveston*, 96 U. S. 341, 350, where a city was sued for damages for putting an end to a contract with the plaintiffs for the improvement of its sidewalks, the only invalid part of which was its promise to pay in bonds, which it was beyond its powers to issue, it was decided that the invalidity of that promise was no reason why the city should not pay for the benefits which it had received from the plaintiff's performance of the contract, Mr. Justice Strong, in behalf of the court, saying: "It matters not that the promise was to pay in a manner not authorized by law. If payments cannot be made in bonds, because their issue is *ultra vires*, it would be sanctioning rank injustice to hold that payment need not be made at all."

So in *Louisiana v. Wood*, 102 U. S. 294, 299, a city, which had received money for bonds issued by it without authority and at an illegal rate of interest and purchased by the plaintiff, was held liable, not on any contract of purchase, nor on any express contract whatever, but on a contract implied from its receipt of the money, Chief Justice Waite saying: "There was no actual sale of bonds, because there were no valid bonds to sell. There was no express contract of borrowing and lending, and consequently no express contract to pay any rate of interest at all. The only contract actually entered into is the one the law implies from what was done, to wit, that the city would, on demand, return the money paid to it by mistake, and, as the money was got under a form of

obligation which was apparently good, that interest should be paid at the legal rate from the time the obligation was denied. That contract the plaintiffs seek to enforce in this action, and no other."

Again, in *Parkersburg v. Brown*, 106 U. S. 487, 503; 1 Sup. Ct. Rep'r, 442, where individuals, in consideration of bonds issued to them by a city for a purpose beyond its powers, executed to the city a trust deed, in the nature of a mortgage, to secure the payment of the bonds and interest, it was held that the bonds could not be enforced against the city, but that the mortgagors had a right to reclaim the property and to demand an account of the city; and Mr. Justice Blatchford, in delivering judgment, said: "The enforcement of such right is not in affirmance of the illegal contract, but it is in disaffirmance of it, and seeks to prevent the city from retaining the benefit which it has derived from the unlawful act. There was no illegality in the mere putting of the property by the O'Briens [the mortgagors] in the hands of the city. To deny a remedy to reclaim it is to give effect to the illegal contract. The illegality of that contract does not arise from any moral turpitude. The property was transferred under a contract which was merely *malum prohibitum*, and where the city was the principal offender. In such a case, the party receiving may be made to refund to the person from whom it has received property for the unauthorized purpose, the value of that which it has actually received." The case of *Chapman v. Douglas Co.*, in which the opinion was delivered by Mr. Justice Matthews, is to the same effect. 107 U. S. 348, 355; 2 Sup. Ct. Rep'r, 62, et seq. In *Pittsburgh, etc., R. Co. v. Keokuk & H. Bridge Co.* it was stated, as the result of the previous cases in this court, that "a contract made by a corporation, which is unlawful and void because beyond the scope of its corporate powers, does not, by being carried into execution, become lawful and valid, but the proper remedy of the party aggrieved is by disaffirming the contract, and suing to recover, as on a *quantum meruit*, the value of what the defendant has actually received the benefit of." 131 U. S. 371, 389; 9 Sup. Ct. Rep'r, 776.

The view which this court has taken of the question presented by this branch of the case, and the only view which appears to us consistent with legal principles, is as follows: A contract of a

corporation, which is *ultra vires*, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and, therefore, beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it.

When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities, which are prerequisites to its existence or to its action, because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation, nor the other party to the contract, can be estopped, by assenting to it, or by acting upon it, to show that it was prohibited by those laws. The doctrine of the common law, by which a tenant of real estate is estopped to deny his landlord's title, has never been considered by this court as applicable to leases by railroad corporations of their roads and franchises. It certainly has no bearing upon the question whether this defendant may set up that the lease sued on, which is not of real estate, but of personal property, and which includes, as inseparable from the other property transferred, the inalienable franchise of the plaintiff, is unlawful and void, for want of legal capacity in the plaintiff to make it. A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms; but on an implied contract of the defendant to return, or, failing to do that, to make compensation

for property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract. The ground and the limits of the rule concerning the remedy, in the case of a contract *ultra vires*, which has been partly performed, and under which property has passed, can hardly be summed up better than they were by Mr. Justice Miller in a passage already quoted, where he said that the rule "stands upon the broad ground that the contract itself is void, and that nothing which has been done under it, nor the action of the court, can infuse any vitality into it;" and that, "where the parties have so far acted under such a contract that they cannot be restored to their original condition, the court inquires if relief can be given independently of the contract, or whether it will refuse to interfere as the matter stands." *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 317; 6 Sup. Ct. Rep'r, 1106, 1107. Whether this plaintiff could maintain any action against this defendant, in the nature of a *quantum meruit*, or otherwise, independently of the contract, need not be considered, because it is not presented by this record, and has not been argued. This action, according to the declaration and the evidence, was brought and prosecuted for the single purpose of recovering sums which the defendant had agreed to pay by the unlawful contract, and which, for the reasons and upon the authorities above stated, the defendant is not liable for. Judgment affirmed.

Mr. Justice Brown, not having been a member of the court when this case was argued, took no part in its decision.*

1. Corporations — *ultra vires* contracts — objection must be made in trial court. — At the same time that the foregoing case was decided, another case between the same parties and arising out of the same contract was passed upon. The Central Transportation Company brought suit against Pullman's Palace-Car Company to recover rent claimed to be due under the contract. On the question of *ultra vires* the court says: "In the present action, which was tried before the other was brought, the objection that the contract sued on was *ultra vires* was not pleaded, nor in any way brought to the notice of the court below. The defendant, therefore, is not entitled to avail himself of it upon this writ of error. *Bell v. Bruen*, 1 How. 169; *Marine Bank v. Fulton Bank*, 2 Wall. 252; *Klein v. Russell*, 19 Wall. 433; *Badger v. Ranlett*, 106 U. S. 255; 1 Sup. Ct. Rep'r, 346, 350; *Union Trust Co. v. Illinois Midland Ry. Co.*, 117 U. S. 494, 488; 6 Sup. Ct. Rep'r, 809. Whether, under these circumstances, this court, of its own motion, might take this objection need not be considered, because upon another ground the verdict must be set aside and a

* Reported in 10 Sup. Ct. Rep'r, 479; 129 U. S. 24.

new trial ordered. Pullman's Palace-Car Co. v. Central Trans. Co., (U. S.); 11 Sup. Ct. Rep'r, 489. On the subject of *ultra vires* contracts generally, see Sherman Center Town Co. v. Morris, 2 Am. R. R. & Corp. Rep. 399, and note; Manchester, etc., R. Co. v. Concord R. Co., 3 Am. R. R. & Corp. Rep. 22, and note; Jamison v. Citizens' Savings Bank, 3 Am. R. R. & Corp. Rep. 285; Merrill v. Town of Monticello, post.

2. Contracts in restraint of trade. — A contract between a domestic firm and a foreign corporation, both engaged in the manufacture and sale of wooden-ware, whereby the former sells its stock, material, tools and machinery to the latter, and agrees not to manufacture or sell wooden-ware in seven named states for five years, nor to permit its property to be used for that purpose during the time limited, is in restraint of trade, and void. Western Wooden-Ware Assn. v. Starkey, 84 Mich. 76; 47 N. W. Rep'r, 604.

Two companies were engaged in the business of issuing "benefit certificates" entitling the holders, in case of sickness or injury, to maintenance, care and medical treatment in any hospital provided by the company. The plaintiff had established a lucrative business of this kind in the states, among others, of Minnesota, Wisconsin and the northern peninsula of Michigan, and had acquired valuable contracts with hospitals in that territory entitling the holder of its certificates to treatment in such hospitals. The two companies entered into a contract by the terms of which the plaintiff agreed to refrain for the term of three years from selling certificates in the territory named, except to railroad employees, and to turn over, as far as in its power, to the defendant, its hospital contracts, in consideration of which the defendant agreed to pay plaintiff a certain sum of money, and also to refrain, for a like period of three years, from selling certificates to railroad employees within the territory referred to. Held, that the contract was not void as being in restraint of trade. National Benefit Co. v. Union Hospital Co., 45 Minn. 272; 47 N. W. Rep'r, 806. A person may legally buy the business of another coupled with an undertaking on part of the seller not to carry on the same business in the same place, or within the same territory, and the question of the reasonableness of the restraint of trade in such cases depends upon whether it is such only as to afford a fair protection to the party in whose favor it is made. Ibid.

On the subject of contracts in restraint of trade, consult Manchester, etc., R. Co. v. Concord R. Co., 3 Am. R. R. & Corp. Rep. 22; Cleveland, etc., R. Co. v. Clessner, 3 Am. R. R. & Corp. Rep. 696; Trust Cases, 1 Am. R. R. & Corp. Rep. 584, 562, 588, 587, 604, and note, page 620.

AMERICAN RAPID TEL. CO. v. HESS ET AL

(Court of Appeals of New York, Feb. 24, 1891.)

1. CONSTITUTIONAL LAW. ELECTRIC WIRES. POWER TO REQUIRE EXISTING WIRES IN STREETS TO BE PLACED BENEATH THE SURFACE. Laws of New York 1884, chapter 534, requiring all electric wires in cities of over five hundred thousand to be placed under the surface of the streets, and Laws of

1885, chapter 489, providing for the appointment of a board of commissioners of electrical subways to enforce the act of 1884, and Laws of 1887, chapter 716, ratifying the contract made by the board with the Consolidated Telegraph and Electrical Subway Company of New York, for the construction of subways in which to place the overhead wires, are valid police regulations of the public streets, which cannot be resisted by a telegraph company incorporated under Laws of New York 1848 chapter 365, section 5, as amended by Laws of 1863, chapter 471, section 3, authorizing the erection of poles and stringing of wires in any public roads and highways, provided that the lines should not be so constructed as to interfere with the public use of the roads or highways.

3. EFFECT OF ACTS OF CONGRESS. The acts of congress (U. S. Rev. St., § 2663 permitting telegraph companies to construct their lines along any railway or post roads, and section 3944 and act March 1, 1884, declaring all letter-carrier routes and all public roads and highways to be post routes, do not give a telegraph company the right to maintain its wires above ground contrary to the laws of the state, nor do they deprive the state of its police control over such highways.

A PPEAL from supreme court, general term, first department.

Wm. G. Wilson for appellant. *D. J. Davis* for respondents.

EARL J. Prior to 1883, the plaintiff was incorporated under act 365 of the Laws of 1848, the general act for the incorporation and regulation of telegraph companies, and the acts amendatory thereof; and prior to that year it had erected its lines of telegraph poles and wires in the streets of the city of New York, described in the complaint. It also had extensive connecting lines in other states, and throughout this state, which constituted a system of telegraphy then in active use and operation. Section 5 of the act of 1848 provides as follows: "Such association is authorized to construct lines of telegraph along and upon any of the public roads and highways, or across any of the waters within the limits of this state, by the erection of the necessary fixtures, including poles, wires or instruments, for suspending the cords or wires of such lines; provided the same shall not be so constructed as to interfere with the public use of said roads or highways, or injuriously interfere with the navigation of said waters; nor shall this act be so construed as to authorize the construction of any bridge across any of the waters of this state." The act chap. 471, Laws 1863, and the act of 1863, and section 3 thereof provides as follows: "Such association is authorized to erect and construct, from time to time, the necessary fixtures for such lines of tele-

graph, upon, over or under any of the public roads, streets and highways, and through, across or under any of the waters within the limits of this state, subject to the restrictions in the said recited act contained." The plaintiff constructed its telegraph lines in the streets of the city of New York under the acts referred to without any special grant or authority from the city.

The claim of the plaintiff is that these acts operated as a grant to it of a franchise to use the streets for its poles and wires, and that, therefore, an inviolable contract was created which is under the protection of the federal constitution, and hence that neither the state nor the city, under its authority, could cause its poles and wires to be removed from the streets, except upon compensation to it ascertained in the manner prescribed by the constitution and laws for cases where private property is condemned for public use. We think the act of 1848, as amended in 1853, can in no proper sense be said to have granted any interests to the plaintiff in the streets of the city. There certainly was no formal grant, and the statutes contain no terms or phraseology appropriate to a grant. They at most confer upon the plaintiff an authority or license to enter upon the streets for its purposes, and subject to certain conditions. The people of the state do not own the streets and the only authority the legislature has over them is to deal with them as streets, and to regulate their use as streets for public purposes; and by these acts it, in effect, determined that one of the purposes for which the streets could be used was the erection of poles and stringing of wires for the business of telegraphy, and that that was a public use, not inconsistent with the use of the streets for general street purposes. These were general public legislative acts, in the exercise of the police power of the state, and, therefore, they were not beyond the reach or touch of future legislation. The legislature did not intend to divest itself, and could not divest itself, of its control over the streets for the public welfare, and we must infer from the language used that it did not intend to bind itself by an irrevocable grant. If, therefore, these acts are to be construed as merely conferring a license which has been acted upon by the plaintiff, the legislature could revoke the license, or modify it in any way, or at any time, when the public interests might require it.

But in this case it is not necessary to hold that the plaintiff

did not, by the acts referred to, obtain some sort of franchise in the streets of the city. We may, for the present purpose, construe these acts as constituting, in some sense, grants of interests in the streets to the companies organized under them, and contracts *sub modo* with such corporations, and yet the contention of the plaintiff in this case must fail. In the exercise of its rights under the assumed grant and contract, this corporation was subject to the regulation and control of the legislature. By giving the franchise, the state did not abdicate its power over the public streets, nor in any way curtail its police power to be exercised for the general welfare of the people; nor did the state absolve itself from its primary duty to maintain the streets and highways of the state in a safe and proper condition for public travel and other necessary street and highway purposes. The grant, if any, was made in reference to the streets, and their maintenance and regulation forever as streets. The state could at all times regulate the size and location of the poles, the height of the wires from the surface of the ground, and their location in the streets; and when the poles and wires became a serious obstruction and nuisance in the streets, from any cause, it could take such action, and make such provisions by law, as were needful to remove the nuisance, and restore the utility of the streets for public purposes. The right of the plaintiff to maintain and operate its wires in the streets could certainly be no greater than the right of railroads, which by public authority occupy the streets and highways of the state. The state, in the exercise of its police power, and the regulating control which it has over corporations created by its authority, may exercise a general supervision over such corporations. It may prescribe the location of the track, the size and character of the rails, the precautions which shall be taken for the protection of the public, and the character and style of highway crossings; and no one has ever questioned that it may do whatever is necessary and proper for the public welfare in the control and regulation of the franchises which such corporations have obtained by statutory authority.

Now, what has the legislature attempted to do in this case? By the act (chap. 534, Laws 1884) it was provided that all telegraph, telephonic and electric light wires and cables, in all cities of the state having a population of five hundred thousand or over,

"shall hereafter be placed under the surface of the streets, lanes and avenues" of the city, and that it should be accomplished before the 1st day of November, 1885. It was further provided that, in case the owners of the property specified should fail to comply with the act within the time specified, the local governments of the cities should remove, without delay, all such wires, cables, and poles wherever found in their respective cities. Under that act no property was or could be taken from any of the owners specified. They were simply required to remove their poles and wires from the surface of the streets, and place the wires underground. Their property was not taken, but the use of their franchise was regulated. In 1885, chapter 499 was enacted, which provided for the appointment of a board of commissioners of electrical subways, and that board was charged with the duty of enforcing the provisions of the act of 1884. It was made the duty of that board to cause to be removed from the surface of the streets, and put and maintain underground, wherever practicable, all electrical wires and cables, so as to enable and require all duly-authorized companies operating the same to transact their business with under-ground conductors, wherever practicable. All subways for under-ground conductors of electricity were required to be built under the direction and control of that board, and no electrical wires or cables were to be allowed above the surface of the streets without the permission of the board. Commissioners were duly appointed under that act, and in 1886, the Consolidated Telegraph and Electrical Subway Company of New York having been incorporated under the laws of this state, the commissioners entered into a contract with it whereby it contracted to build, with its own capital, the necessary subways for the electrical conductors, the subways to be constructed in all respects subject to the approval of the commissioners. It was also provided in the contract that all corporations owning and operating electrical wires above the streets should have the right to place them in the subways, under certain conditions specified. In 1887 the legislature enacted chapter 716, entitled: "An act in relation to electrical conductors in the city of New York." By that act the agreement made between the subway commissioners and the Consolidated Telegraph and Electrical Subway Company, above referred to, was ratified and confirmed; and the act pro-

vided that whenever, in the opinion of the board of electrical control constituted by that act, sufficient conduits or subways under ground, shall have been made ready, the board shall notify the owners or operators of electrical conductors above ground in such streets or locality to make such electrical connections in such under-ground conduits or subways as shall be determined by the board, and to remove their poles and wires from the street within ninety days after such notice. This provision was made a police regulation in and for the city of New York, and, in case it was not complied with by the telegraph and other companies referred to, it was made the duty of the commissioner of public works to cause the poles, wires, etc., to be removed forthwith by the bureau of incumbrances, upon the written order of the mayor to that effect. Subways having been constructed in certain of the streets of the city of New York, by the Consolidated Telegraph and Electrical Subway Company, under the supervision and with the approval of the board of electrical control, notice was given to the plaintiff, as provided in the act, to remove its poles and wires from the streets, and place its electrical conductors in such subways. Having refused to comply with such notice, and with the provisions of the act, the commissioner of public works of the city caused the poles to be cut down, and the wires to be removed from the streets, and this is what the plaintiff complains of.

Its property was not taken for public use. It was simply removed from the streets, where it had become a nuisance, and the public authorities had the same right to remove it from the streets, doing no unnecessary damage, that it had to remove any other incumbrance therefrom. After the passage of the acts referred to, and the building of the subways, and the notice to the plaintiff, it had no right longer to maintain its poles and wires above the surface of the streets. They were then there without authority, and thus became a nuisance, and hence the public officials had the right to remove them. It is quite true that the plaintiff could not remove its electrical conductors into the subways without some expense, but the same is true of railroads occupying streets. They cannot change from one style of rail to another, nor from one place in the street to another, nor make a change of grade without a considerable expense; and yet the mere fact that they are subjected to expense is no answer to the

right of the public, in pursuance of law, to require them to comply with the prescribed regulations. If the authority did not otherwise exist to require these poles and wires to be removed from the streets, it could be found in section 5 of the act of 1848, in which is contained the authority to construct telegraphic lines upon public roads and highways, with the proviso that the same shall not be "so constructed as to incommode the public use of such roads or highways." Who shall judge whether they incommode the public use of the streets? It is unquestioned that they do, and the legislature has determined that fact, and, when the plaintiff maintained its wires and poles in the streets in such a manner as to incommode the public use of the streets, the legislature had the right to provide that they should put them under the streets, so that the streets above the surface could be devoted to the public uses for which they were intended.

The plaintiff seeks to strengthen its position, in reference to the use of the streets of the city of New York, under the laws of the United States, to which we will make brief reference. It is provided in section 5263 of the Revised Statutes of the United States that "any telegraph company now organized, or which may hereafter be organized, under the laws of any state, shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States, which have been, or may hereafter be, declared such by law, and over, under or across the navigable streams or waters of the United States; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post-roads." Section 5268 provides that, "before any telegraph company shall exercise any of the powers or privileges conferred by law, such company shall file their written acceptance with the postmaster-general of the restrictions and obligations required by law." Section 3964 provides that all letter-carrier routes established in any city or town for the collection and delivery of mail matters are post-roads; and by the act approved March 1, 1884, it is enacted that "all public roads and highways, while kept up and maintained as such, are hereby declared to be post-routes." The plaintiff filed the written ac-

ceptance with the postmaster-general required by section 5263. The precise scope and range of operation of these sections within a state are not quite apparent, and cannot be easily defined. But this much at least, must be true, that under them no telegraph company could interfere with the use of the streets and highways of the state, except under regulations prescribed for the control of all telegraph companies within the state, nor could such companies interfere with streets and highways in the state so as materially to impair their usefulness as ordinary highways. Nor could these congressional acts deprive the state of its control over its highways, and its right to regulate their use, under the police power, for the public welfare. The laws of congress are perfectly satisfied by the permission granted to the plaintiff, of which it is perfectly feasible for it to avail itself, to place its electrical conductors in the subways constructed beneath the surface of the streets. We have carefully scrutinized the contract entered into by the board of electrical control with the defendant, the Consolidated Telegraph and Electrical Subway Company, and we find nothing in its provisions unreasonable or impractical, and the power of the legislature to authorize such a contract, and to confirm it when made, is beyond doubt. These acts of 1884, 1885 and 1887 have been under consideration in several cases, and have uniformly been upheld and enforced. *People v. Squire*, 107 N. Y. 593; 14 N. E. Rep'r, 820; 14 Daly, 154; *Illuminating Co. v. Hess*, 3 N. Y. Supp. 777; *Illuminating Co. v. Grant*, 7 N. Y. Supp. 788; *Telegraph Co. v. Mayor, etc.*, 38 Fed. Rep'r, 552, opinion by Wallace, J., in United States circuit court. We are, therefore, of opinion that the judgment should be affirmed, with costs. All concur.*

Police power — compelling railroads and other quasi public corporations to make alterations and construct works for the purpose of promoting the public safety, convenience and welfare.— The electric subway acts which are passed upon in the foregoing case were before the same court in *People, ex rel. New York Electric Lines Co., v. Squire*, 107 N. Y. 593. Touching the validity of these acts as valid police regulations the court, per Ruger, Ch. J., says "The relator also claims that the act is obnoxious to the clause of the constitution which forbids the enactment of any law impairing the obligation of contracts. It may be said in reference to this claim that the contract itself provides that the work of removal and replacement and of making excavations in the streets, avenues, etc., of the city by any telegraph company for the pur-

* Reported in 26 N. E. Rep'r, 919; 125 N. Y. 641.

pose of laying its wires, shall be subject to the control and supervision of the commissioners of public works, and such commissioners might well require, in the exercise of their discretion, that the locality, time, mode and manner of performing such work should be approved by the officers having the general supervision of that subject in the city, before authorizing a single company, among the many claiming such privileges, to tear up its streets and construct trenches through its various thoroughfares and avenues, at their own will and pleasure.

"But we are of the opinion, for other reasons, that this legislation did not and was not intended to materially impair or restrict the enjoyment of the franchise secured by the relator. The necessity of these acts sprung out of a great evil, which, in recent times has grown up and afflicted large cities by the multiplication of rival and competing companies, organized for the purpose of distributing light, heat, water, the transportation of freight and passengers and facilitating communication between distant points, and which require in their enterprises the occupation not only of the surface and air above the streets, but indefinite space under ground. This evil had become so great that every large city was covered with a net work of cables and wires attached to poles, houses, buildings and elevated structures, bringing danger, inconvenience and annoyance to the public. Extensive spaces under ground were also required to lay pipes and build trenches and arches, to transact the business of the various corporations requiring them. These works not only called for great skill to harmonize the various and conflicting claims of competing companies to rights above as well as beneath the ground, but a comprehensive plan and supervision, to prevent the constant disruption of the streets and the interruption of travel. The necessity of a remedy for these public annoyances has long been felt, and it finally culminated in the enactment of the several statutes referred to.

"These statutes were obviously intended to restrain and control, as far as practicable, the evils alluded to, by requiring all such wires to be placed under ground in such cities, and be subject to the control and supervision of local officers, who could reconcile and harmonize the claims of conflicting companies, and obviate, in some degree, the evils which had grown to be almost, if not quite, intolerable to the public. The scheme of these statutes was not to annul or destroy the contract rights of such companies, but to regulate and control their exercise. They did not purport to deny them any privileges theretofore granted, but they did require that they should be exercised with due regard to the claims of others, and in such a way that they should cease to constitute a public nuisance, and should be enjoyed in such a manner as to inconvenience and endanger the general public as little as possible.

"That regulations of the character provided for in these acts are strictly police regulations, and such as no chartered rights can nullify or override, is too clear to admit of dispute. The primary and fundamental object of all public highways is to furnish a passage-way for travelers in vehicles, or on foot, through the country. Bouvier's Institutes, § 442. They were originally designed for the use of travelers alone. But in the course of time and in the interest of the general prosperity and comfort of the public they have been put, especially in large cities, to numerous other uses; but such uses have always been held to be subordinate to the original design and use. Thus,

they have been appropriated in recent times for the reception of sewers, water-pipes, gas-pipes, pipes for heating and manufacturing purposes, under-ground railroads, trenches for wires for telegraph, telephone and other purposes, which all require in their construction the disruption of the pavements and the temporary interruption, at least, of the rights of travelers in the public highways. The due and orderly arrangement of the various and conflicting claims to privileges in the streets of large cities, would seem imperatively to require the creation of a neutral board, with controlling authority, to form a comprehensive plan by which these various enterprises may be harmonized and carried on without detriment to each other, and with due regard to the rights of the public. Such power is pre-eminently a police power, and it is within the legitimate authority of a legislature to delegate its exercise to municipal corporations." *People, ex rel. N. Y. Elec. Lines Co., v. Squire*, 107 N. Y. 593-603, 605. See, also, *Western Union Tel. Co. v. New York*, 38 Fed. Rep'r, 552.

The tracks of two railroads crossed Asylum street in the city of Hartford at grade. The general assembly of Connecticut passed an act appointing a board of commissioners with power to adopt some plan for bridging either the street or the tracks, and to alter the location of either so far as necessary, to cause land to be condemned if necessary for carrying out the plan adopted and to apportion the expense among the corporations interested. Upon an application for the appointment of appraisers to assess the compensation for land taken for the purposes of the act, it was held to be a valid exercise of power on the part of the legislature, and the application was sustained. *Woodruff v. Catlin*, 54 Conn. 277. The court says: "The act in scope and purpose concerns protection of life. Neither in intent nor fact does it increase or diminish the assets either of the city or of the railroad corporations. It is the exercise of the governmental power and duty to secure a safe highway. The legislature having determined that the intersection of two railways with a highway in the city of Hartford at grade is a nuisance dangerous to life, in the absence of action on the part either of the city or the railroads, may compel them severally to become the owners of the right to lay out new highways and new railways over such land and in such manner as will separate the grade of the railways from that of the highway at intersection; may compel them to use the right for the accomplishment of the desired end; may determine that the expense shall be paid by either corporation alone or in part by both; and may enforce obedience to its judgment. That the legislature of this state has the power to do all this, for the specified purpose, and to do it through the instrumentality of a commission, it is now only necessary to state, not to argue." Page 295. The validity of the act was reaffirmed in *Woodruff v. New York, etc., R. Co.*, 59 Conn. 63, which was a proceeding for a *mandamus* against the defendant railroad company to compel it to remove its tracks, to conform to the order of the commission.

The legislature of Connecticut has provided by general laws for the abolition of grade crossings throughout the state. This is done by application to the railroad commissioners by either the town or city authorities in which the particular crossing is situated, or by the railroad company affected. The commission appoints a hearing and determines how the change shall be made. If the application is by the railroad company the expense is to be borne wholly by the

company, if by the public authorities the commission may apportion to the public not exceeding one-fourth the expense, in cases where the highway existed when the railroad was laid out, and not exceeding one-half the expense in other cases.

In a recent decision, the supreme court refers to this legislation as follows:

For fully twenty years the legislature of this state has been devising laws to prevent the destruction of human life at railroad crossings of highways. Disasters, frequent, and sometimes appalling, have been happening at such crossings ever since railroads have been built, and the legislature has been seeking from time to time to frame enactments by which they should be avoided. These acts appear in the Public Acts of 1870, chapter 125; Acts 1873, chapter 67; Acts 1876, chapter 36; Acts 1877, chapter 8; Acts 1883, chapter 107, and Acts 1884, chapter 100. The act of 1884 intended to make provision for the entire removal of all the grade crossings in the state with all convenient rapidity. It gave full power to the railroad commissioners, and virtually said to them: 'Make such alterations of highways at their crossings of railroads at grade as you shall deem best, but have the grade crossings removed.' In 1888 the provisions of all the then existing acts were brought together into one section, which is section 3489 of the General Statutes; and this has been further reinforced and made emphatic by the act of 1889, chapter 220. In the light of these reiterated expressions of the legislative will it is undeniable that it has become the settled policy of the legislature to abolish grade crossings." *Doolittle v. Selectmen of Brandford*, 22 Atl. Rep'r, 386.

The validity of these acts has been sustained in numerous decisions. *Town of Suffield v. Northampton Co.*, 53 Conn. 367; *Railroad Co. v. Waterbury*, 55 Conn. 19; *Town of Westbrook's Appeal*, 57 Conn. 95; *Town of Fairfield's Appeal*, 57 Conn. 167; *New York, etc., R. Co.'s Appeal*, 58 Conn. 532; *Doolittle v. Selectmen of Brandford*, 22 Atl. Rep'r, 386.

In *New York, etc., R. Co.'s Appeal*, 58 Conn. 532, 540, the court says: "Two parties are engaged in legitimate business; both supply public wants, and both, in some sense, discharge governmental duties. Both furnish ways to facilitate public travel. The way of each crosses that of the other at grade, and more or less danger unavoidably attends their use. As the use increases the danger increases. The policy of the state now is to abolish these grade crossings as rapidly as can be reasonably done. Legislation on this subject assumes that each party, in the discharge of its duty, is concerned in creating the danger, and that each may justly be required to contribute to the expense of its removal; or that either may be required to pay the whole; and if each contributes, that the proportion that each shall pay may be determined by the legislature in each case as it arises, or by a general rule, by itself, or by a delegation of its power to the railroad commissioners. This exercise of power is justifiable on the ground that government itself in the discharge of its governmental duties, undertakes to remove the danger, and does it in the same manner, and through the same instrumentalities, that it provides and maintains highways through and at the expense of towns and other corporations. So far as towns are concerned, it is a duty that has ever devolved upon them to keep the highways reasonably safe. They are compelled to act without compensation or pecuniary profit. Their sole motive is the public welfare. Railroad companies, in some sense, are but the agents of the government in

affording to the public a more expeditious and vastly improved method of travel. As a compensation for their capital and labor invested they are permitted, as turnpike companies formerly were, to charge the public for the use of their ways. Unlike towns they do not act upon compulsion, but by choice. Their motive is private gain; public benefit is incidental. Advantage to the public is a reason for granting the franchise; but the enterprise itself is essentially a private one. They contribute largely to the danger, and the state may well require them to contribute largely to its removal."

After referring to grade crossings as in effect nuisances the court further says: "We think that it is competent for the state to cause them to be abated, and that it may require any party responsible for their existence to pay any part or all the expense. That being so, requiring the railroad company to pay three-fourths of the expense, however just it might be to require the town to pay more than one-fourth, is not a matter of which the railroad company can legally complain. The statute may operate harshly, as all statutes are liable to in certain cases, but it is not unconstitutional." *N. Y. & N. E. R. Co.'s Appeal from R. R. Comrs.*, 58 Conn. 532, 540, 541.

It has long been settled that railroads may be compelled to construct and maintain suitable cattle-guards and fences, and this power is put upon the general province of government to provide for the protection of life and property. *Buckley v. New York, etc., R. Co.*, 27 Conn. 479; *Ohio & Miss. R. Co. v. McClelland*, 25 Ill. 140; *Ohio & Miss. R. Co. v. Brubaker*, 47 Ill. 462; *M. & I. R. Co. v. Whiteneck*, 8 Ind. 217; *Indianapolis R. Co. v. Kercheval*, 16 Ind. 84; *Indianapolis R. Co. v. Marshall*, 27 Ind. 300; *Indianapolis R. Co. v. Townsend*, 10 Ind. 88; *New Albany R. Co. v. Tilton*, 16 Iowa, 6; *Toledo, etc., R. Co. v. Fowler*, 22 Ind. 816; *Indianapolis, etc., R. Co. v. Parker*, 29 Ind. 471; *Jones v. Galena R. Co.*, 16 Iowa, 6; *Kansas Pac. R. Co. v. Mower*, 16 Kans. 573; *Mo. Pac. R. Co. v. Harrelson*, 44 Kans. 253; *Norris v. Androscoggin R. Co.*, 39 Me. 273; *Wilder v. Maine Cent. R. Co.*, 65 Me. 832; *Sawyer v. Vermont, etc., R. Co.*, 105 Mass. 196; *Eummons v. Minneapolis, etc., R. Co.*, 35 Minn. 508; *Gorman v. Pacific R. Co.*, 26 Mo. 441; *Trice v. Hannibal, etc., R. Co.*, 49 Mo. 488; *Blewett v. Wyandotte, etc., R. Co.*, 73 Mo. 588; *Dean v. Sullivan R. Co.*, 2 N. H. 816; *Cornwall v. Sullivan R. Co.*, 8 N. H. 161; *Smith v. Eastern R. Co.*, 35 N. H. 356; *Corwin v. New York, etc., R. Co.*, 13 N. Y. 42; *Bruce v. New York Cent. R. Co.*, 27 N. Y. 269; *Statts v. Hudson River R. Co.*, 8 Keyes, 196; *Bradley v. Buffalo, etc., R. Co.*, 34 N. Y. 429; *Waldron v. Bensselaer, etc., R. Co.*, 8 Barb. 390; *Pennsylvania R. Co. v. Riblet*, 66 Penn. St. 164; *Louisville, etc., R. Co. v. Burke*, 6 Coldw. 45; *Thorpe v. Rutland, etc., R. Co.*, 27 Vt. 140; *Nelson v. Vermont, etc., R. Co.*, 26 Vt. 717; *Blair v. Milwaukee R. Co.*, 20 Wis. 254; *Mo. Pacific R. Co. v. Humes*, 115 U. S. 512.

It has also been held that where two railroads intersect, they may be compelled to construct a suitable station for the accommodation of passengers and provide facilities for the transfer of freight from one to the other. *San Antonio, etc., R. Co. v. State (Tex.)*, 14 S. W. Rep'r, 1063; *State, ex rel., v. Kansas City, etc., R. Co.* 32 Fed. Rep'r, 722.

It has also been held that a railroad may be compelled to widen and repair a bridge over its road (*English v. New Haven, etc., R. Co.*, 33 Conn. 240); that a street-car company may be compelled to water its tracks so as to keep the dust laid (*City, etc., R. Co. v. Savannah*, 77 Ga. 731), and to pave the street be-

tween its tracks and for a foot on each side thereof (Sioux City Street Ry. Co. v. Sioux City, 188 U. S. 98); and that a railroad company may be compelled to keep a flagman at highway crossings when the use of the highway is such as to make such a regulation reasonable. Toledo, etc., R. Co. v. Jacksonville, 67 Ill. 37; Lake Shore, etc., R. Co. v. Cincinnati, etc., R. Co., 30 Ohio St. 604.

In Washington Bridge Co. v. State, 18 Conn. 53, it was held that a bridge company could not be compelled to construct a draw in its bridge. In Hannibal v. Mo. & Kans. Telephone Co., 81 Mo. App. 28, it was held that a telephone company which had erected its poles in a public street in accordance with permission lawfully given by the municipal authorities could not be compelled to change the location of the same.

The limitations of this power are discussed somewhat at length in Toledo, etc., R. Co. v. Jacksonville, 67 Ill. 37, as follows: "There can be no question that railway corporations are subject to police regulations as well as private citizens. The general assembly, when the public exigencies require it, has power to regulate corporations in their franchises so as to provide for the public safety. The exercise of this right in no manner interferes with or impairs the powers conferred by their acts of incorporation. G. & C. U. R. Co. v. Loomis, 13 Ill. 548; Thorpe v. Rutland & Burlington R. Co., 27 Vt. 140.

"Under this power, it has been held that the legislature may require railroad corporations, notwithstanding no such right has been reserved in the charters, to fence their tracks, to put in cattle-guards, to place upon their engines a bell, and to do many other things for the protection of life and property. This power is inherent in the state, and it cannot part irrevocably with its control over that which is for the health, safety and welfare of society.

"But such regulations must be what they purport to be, police regulations, and must be reasonable when applied to corporations or individuals. What are reasonable regulations, and what are subjects of police powers, must necessarily be judicial questions. The law-making power is the sole judge when the necessity exists, and when, if at all, it will exercise the right to enact such laws.

"Like other powers of government, there are constitutional limitations to its exercise. It is not within the power of the general assembly, under the pretense of exercising the police power of the state, to enact laws not necessary to the preservation of the health and safety of the community that will be oppressive and burdensome upon the citizen. If it should prohibit that which is harmless in itself, or command that to be done which does not tend to promote the health, safety or welfare of society, it would be an unauthorized exercise of power, and it would be the duty of the courts to declare such legislation void.

"It seems to us that the ordinance in this case imposes an unreasonable burden upon the railroad company. There is but a single track, so far as the record discloses, at the point where it requires the service of a flagman, and only the usual trains of the company pass over it. It is totally unlike a place where a number of tracks cross a public street upon which there is a great amount of travel, where trains are made up, and where the trains and locomotives doing the work pass and repass each other at short intervals. The frequency with which trains pass and repass at such places renders the dangers

to be apprehended constantly imminent, and the legislature may so declare and make it obligatory on the company to adopt measures to secure the public safety. The rights of the company and the public to the use of the crossing are mutual, but it is the duty of the company to provide the proper safeguards and the degree of diligence must be in proportion to the hazard. A regulation that would require the company to place a flagman at such a place, or at any place where danger to the public safety, in the judgment of prudent persons, might be apprehended at any time, would be a reasonable one and could unquestionably be enforced. There can be no necessity, however, for the services of a flagman at a crossing of a public highway in the country, where there is but little travel. There it would be a sufficient protection if the company shall be required to erect signs that will notify persons that they are approaching a railroad crossing, and to give the usual signals. It is then the duty of the citizen to exercise a reasonable precaution for the safety of himself and his property.

"It would hardly be insisted a regulation that would compel a railway company to maintain a flagman at every crossing of a public road or street on its entire line would be demanded by the public exigencies, or be within the constitutional exercise of the police power of the state. It is a matter of which we may take judicial notice, there does not now exist a necessity to enforce in this state many of those rigid regulations that have been adopted on some of the English railways and in some of the densely-populated countries on the continent of Europe. Doubtless as the population increases and the dangers multiply, it will become necessary in this country to increase precautionary measures for the public safety, and the companies will be compelled to bear the additional burden made necessary by the hazardous business in which they are engaged. It is their work that renders public crossings dangerous, and hence it is they may be compelled to bear the expenses of such measures as may be adopted to secure the lives and property of those who have an equal right with them to the use of the crossing on the highway.

"There is nothing at the crossing where the company is required, by the provisions of the ordinance in the case at bar, to keep a flagman, that makes it unusually dangerous. So far as we know, it is an ordinary crossing. There is but a single track, on which only the usual trains pass at regular and irregular intervals and distant apart. The city has not even deemed it advisable to require the company to slacken the speed of its trains when passing this point, as it is compelled to do by ordinance when crossing other streets in the city. If the company can be compelled to maintain a flagman at this point, there is no reason why it could not be compelled to keep one at every road and street crossing on its entire line. That there are places where the danger to be apprehended is so constant and imminent, by reason of the construction of the passage-way over the track, the company may be required to employ a flagman to warn persons of the danger and conduct them across, we entertain no doubt, but the point designated in this ordinance is not such a one, at least it does not appear to be so from the ordinance itself or from any thing in the record." *T., W. & W. Ry Co. v. City of Jacksonville*, 67 Ill. 87, 40-42.

CHICAGO, ST. LOUIS, ETC., R. CO. V. PULLMAN SOUTHERN CAR CO.

(Supreme Court of the United States, March 2, 1891.)

1. RAILROAD COMPANIES. LIABILITY FOR SLEEPING-CAR DESTROYED BY FIRE. Under a contract between a sleeping-car company and a railroad company, by which the latter assumed responsibility for damage, by "accident or casualty," to drawing-room or sleeping-cars used by it under the contract, the railroad company is liable for the loss of such cars by a fire occurring from a cause unknown.

2. EFFECT OF INSURANCE BY SLEEPING-CAR COMPANY. The fact that the sleeping-car company had insured the destroyed cars, and has collected the insurance money, does not affect its right to maintain an action on the contract against the railroad company, the policies of insurance providing for an assignment of any claim of the car company to recover for the destruction of the cars, nor will the recovery be limited by the amount collected from the insurance companies, as the excess above a just indemnity will be held by the sleeping-car company in trust for the insurance companies.

3. VALIDITY OF CONTRACT GIVING SLEEPING-CAR COMPANY EXCLUSIVE RIGHT TO SUPPLY RAILROAD WITH CARS. A stipulation in the contract that the sleeping-car company shall have the exclusive right, for fifteen years, to furnish drawing-room and sleeping-cars for the railroad company's use, does not render the contract void as being in restraint of trade or against public policy, as such stipulation does not disable the sleeping-car company from furnishing cars to rival railroad, and the law will imply, from the terms of the contract, that it must furnish the railroad company in question, not only adequate and safe cars, but sufficient in number for the use of the public traveling on the latter's road.

4. LIABILITY OF RAILROAD FOR CAR DESTROYED WHILE IN ITS YARDS. CONTRACT CONSTRUED. Under the contract, by which the sleeping-car company was to place a designated number of its cars at the disposal of the railroad company, and by which the latter was to become responsible for damages while such cars were on its road, or in its shops undergoing repairs, the railroad company is liable for the destruction by fire of a car which had a few hours before come from active service on the road, and which had been placed in the railroad company's yard for the purpose of being cleaned and resupplied for another trip on the following day.

5. LIABILITY FOR CAR DESTROYED IN SHOP OF RAILROAD COMPANY WHILE UNDERGOING REPAIRS BY SLEEPING-CAR COMPANY. Where the sleeping-car company became dissatisfied with the manner in which the repairs were made by railroad company, and undertook itself to make such repairs, in a shop set apart to it by the railroad company for that purpose, over which it was given exclusive control, and to which the railroad company's agents had no access, a car which for six months has been undergoing repairs in such repair shop is not in the possession or under the control of the railroad company, and the latter is not liable for its loss by an accidental fire while therein.

IN ERROR to the circuit court of the United States for the eastern district of Louisiana.

This action was brought by the Pullman Southern Car Company to recover from the Chicago, St. Louis and New Orleans Railroad Company the damages alleged to have been sustained on account of the destruction by fire of two of the plaintiff's sleeping-cars, the Great Northern and the Louisiana, while on the premises of the defendant. There was a verdict and judgment for the sum of \$19,000, with interest from September 20, 1886, the date of judicial demand, at the rate of five per cent per annum until paid, with costs. The assignments of error relate entirely to instructions given on behalf of the plaintiff, and to the refusal to give instructions asked by the defendant.

The action is based upon a written agreement between these corporations, dated April 5, 1879, showing that the business of the plaintiff was to operate drawing-room and sleeping-cars which it hired, under written contracts for a term of years, to be used and employed on and over the lines of railway companies, receiving therefor income and revenue by the sale to passengers of seats, berths and accommodations therein; and that the defendant was desirous of availing itself of their use, on its own routes, and also of connections, by means of such drawing-room and sleeping-cars, with other railroads over which the plaintiff was running its cars. In order to effect the objects of the parties it was, among other things, agreed as follows:

(1) The plaintiff was to furnish drawing-room and sleeping-cars "sufficient to meet the requirements of travel," on and over the defendant's railway, and such roads as the latter then or thereafter controlled as owner, lessee or otherwise; the cars so furnished to be satisfactory to the general manager or superintendent of the railroad company, and to be in part certain named cars, ten in number, among which were the Louisiana and the Great Northern, then operated on the defendant's lines. (2) Each of the plaintiff's cars was to be manned, at its own cost, by one or more of its employees, as might be needful for the collection of fares and the comfort of passengers; such employees to be subject to the rules and regulations established by the defendant for its own employees. (3) "In consideration of the use of the aforesaid cars," the defendant was to haul them on passenger trains on its own lines of

railroad, and on passenger trains on which it might, by virtue of contracts or running arrangements with other roads, have the right to use them, "in such manner as will best accommodate passengers during the use of said cars." (4) By article sixth of the agreement, all necessary lubricating material, ice, fuel and material for lights were to be supplied, and the washing and cleaning of the cars furnished under the contract to be done, by the defendant at its expense, which should also renew and replace, as often as necessary, links, pins, bell-cord and couplings for air-brake hose, without charge to the plaintiff. (5) The plaintiff was to keep the cars furnished under the contract in good order and repair; renew and improve them, when necessary, at its own expense; keep them up to the average standard of the best and most approved sleeping-cars on any road using an equal number of cars, "excepting repairs and renewals provided for in article sixth of this agreement, and such as are made necessary by accident or casualty, it being understood that the railway company shall repair all damages to said cars of every kind occasioned by accident or casualty during the continuance of this contract, except that the Pullman Company assumes all responsibility for any loss or damage occurring to said cars arising from defective heating apparatus or lights furnished by it." (6) As proper compensation for the maintenance of the running gear and bodies of the cars, the defendant was to pay plaintiff "three cents per car per mile for every mile run by said cars upon the road of the railway company or upon the roads of other companies, by direction of the officers of the railway company, while in service under this contract;" and at all times, when requested by the plaintiff, to make promptly such repairs to the cars furnished under the contract as might from time to time become necessary, and, without request, make such repairs as were required "to insure their safety, rendering bills monthly to the Pullman Company for repairs to cars, and charging for the same only the actual cost of material and labor expended on such repairs, with an addition of ten per cent to cover general expenses, all settlements and payments for mileage and repairs to be made monthly between said companies." (7) Whenever the revenue from sales of seats and berths equalled an average of \$7,500 per car per annum upon the number of cars furnished under the contract, then, and while such revenue continued, the

defendant should not pay mileage for any car so furnished; the plaintiff, in such case, to bear the expense of all repairs and improvements to its cars, "except such repairs as are rendered necessary by accident or casualty, and such as are provided for in article sixth of this agreement, which shall be made by the railway company, as herein before mentioned." (8) The plaintiff was to have the exclusive right, for a term of fifteen years from the date of the agreement, to furnish drawing-room and sleeping cars for the defendant's use on all its passenger trains on roads then or subsequently controlled or owned by it, and on roads over which it had the right to run such cars; the defendant not to "contract with any other party to run said class of cars on and over said lines of road during said period of fifteen years." (9) In case either party failed to cleanse or repair any of the cars, according to the conditions of the agreement, and the party so in default should neglect and refuse to perform its agreement in this respect within a reasonable time after notice of such default, the other party had the right to cleanse and make or cause to be made all necessary repairs and renewals to said cars, at the cost of the party in default. (10) If either party failed, at any time, to keep and perform its covenants, as set forth in the agreement, the one not in default, after the expiration of a reasonable time from the service of written notice of such default, was at liberty to declare the contract at an end. (11) The defendant was given the option to terminate the contract at the end of five, eight or eleven years, upon written notice to the plaintiff, served six months before the day fixed for such termination; and if the contract was so terminated, without default upon the part of the plaintiff, the defendant was required to purchase the cars and equipments of the Pullman Company "then in use, or assigned and accepted for use," under the contract, or such interest therein as the defendant may not have previously acquired under the provisions of this contract, "at the actual cash value of the same," with the right to use them without charge for patent-rights for their interior arrangements. For the purposes of the option given to terminate the contract, it was agreed "that the cars now [then] running on said railroad, and which should form part of the cars and equipments to be furnished under this contract, together with such additional cars and equipments as may hereafter be assigned to

the railway company, shall be appraised," etc. (12) The taxes upon all cars furnished to the defendant by the plaintiff were to be paid equally by the parties.

It was in proof that at the time of the fire the cars Great Northern and Louisiana were insured for the plaintiff; that before the commencement of this action the insurance companies paid to it, in full settlement of the loss and damage, the sum of \$19,000; and that this action is prosecuted under a written agreement, between the plaintiff and the insurance companies, that it should be conducted jointly by their counsel, and the amount recovered by suit, settlement or compromise equally divided between them.

The ten cars mentioned in the agreement of April 5, 1879, were furnished to the defendant, and were used on its road. Subsequently to that date, the plaintiff having complained of the manner in which its cars were repaired at the defendant's shops in McComb City, on its road about one hundred and five miles above New Orleans, the latter, by its president, suggested that the plaintiff repair its own cars. Thereupon, in order to facilitate such repairing, a part of the passenger-car depot shed of the defendant in New Orleans was set apart to the exclusive use and control of the plaintiff which, at its own expense, fitted up the portion so assigned to it—one part as a linen room, one as a carpenter shop, one as an upholstery room, and one as a paint shop—inclosing the same with partitions, and keeping it locked with the keys in possession of its own employees. The place so fitted up was known as the "Pullman repair shop." The employees of the defendant had no right of access to it. Although the tracks of the defendant extended into this repair shop, there were folding-doors across them that were closed by an iron bar on the inside. The plaintiff paid nothing for the use of this shop. The watchman over the whole premises was maintained by the defendant. With the permission and consent of the defendant the plaintiff, on one or two occasions, repaired and varnished in that shop cars assigned by it to other railroads, and not covered by the agreement in question.

The fire in question "originated, from a cause unknown," in the "Pullman repair shop." It occurred about three o'clock on the morning of the 27th of May, 1882, and resulted in the total

destruction of both the Great Northern and the Louisiana. The Great Northern was at the time standing on the defendant's track in the paint room of that shop, behind the barred folding-doors across the railroad tracks. It had been there since the previous October undergoing repairs, refitting and revarnishing, and its name changed to that of "Chatawa." But for its destruction it would have been in condition on the day succeeding the fire to be again put into the service under the contract of 1879. There was no evidence that any other car was furnished to take its place on the defendant's road while it was in the shop undergoing repairs. When the fire occurred, the Louisiana was standing on the defendant's track, in New Orleans, under a depot shed belonging to it, and used to store cars when not in actual transit—those belonging to it as well as those belonging to the plaintiff. That shed was called by the defendant's employes the "Pullman shed." The Louisiana reached New Orleans about three o'clock in the afternoon of May 26, 1882, from a trip over defendant's road, was placed in the above depot shed, and was to have been sent out on another trip at six o'clock on the afternoon of May 27, 1882. The Great Northern, when burned, was under the same depot shed, but, as already stated, in that part known as the Pullman repair shop. It is in evidence that, at various times during the existence of the contract sued on, the plaintiff took some of the ten cars, furnished under it, to shops in St. Louis, Mo., and Pullman, Ill., entirely off the line of the defendant's road, in order to be repaired, so as to bring them up to the designated standard.

The question of negligence was left to the jury, which was instructed that the plaintiff could not recover if the fire was caused by its negligence.

James Fentress, T. J. Semmes, and Girault Farrar for plaintiff in error. *Thos. F. Hargis, Geo. B. Eastin, E. H. Farrar, B. F. Jones and E. B. Kruttschnitt* for defendant in error.

Mr. Justice HARLAN, after stating the facts in the foregoing language, delivered the opinion of the court.

1. The jury were instructed, at the request of the plaintiff, that a damage or destruction by fire is a casualty or accident, within the meaning of the contract. This the defendant contends was error. We do not think so. The fire that destroyed the Great

Northern and the Louisiana originated, as we have seen, from a cause unknown. An accident or casualty, according to common understanding, proceeds from an unknown cause or is an unusual effect of a known cause. Either may be properly said to occur by chance and unexpectedly. Webst. Dict.; Imperial Dict. It was no doubt used in that sense by the parties to the contract in question. They manifestly contemplated that the railroad company should assume all responsibility for the loss of drawing-room or sleeping-cars, while in use, or subject to be used, by it, with the single exception, distinctly made, of loss or damage occurring "from defective heating apparatus or lights furnished" by the Pullman Company, which assumed all responsibility for loss or damage to its cars resulting from either of the latter causes. This exception in respect to defective heating apparatus and lights furnished by the plaintiff — necessarily referring to loss or damage by fire caused in either of those modes — renders it clear that the railroad company assumed responsibility for the loss of cars used or subject to be used by it under the contract, whenever such loss was by fire occurring from a cause unknown, that is, accidentally or from casualty.

The jury were instructed that the insurance of the cars by the plaintiff was *res inter alios acta*, and had no determining effect upon the right of the plaintiff to recover in this action. The giving of this instruction has been assigned for error. We are of opinion that the obtaining of insurance by the plaintiff, the collection of \$19,000 in full settlement of its claim against the insurance companies, and the agreement between it and them for the bringing of this action for their joint benefit, were matters with which the railroad company had no concern and cannot affect the determination of this case. By the provisions of the policies, the insurance companies were entitled, in case of loss, to an assignment of the plaintiff's right to receive satisfaction therefor from any other person or persons, town or corporation, with a power of attorney to sue for and recover the same at the expense of the insurer. Upon payment of the loss, or to the extent of any payment by them on account of such loss, the insurance companies were subrogated to the rights of the insured, and could, in the name of the insured, or in their joint names, maintain an action against the railroad company for indemnity, if that company was liable to

the insured for the loss of the cars. The acceptance of a given amount from the insurance companies in full discharge of their liability did not affect the right of the plaintiff to recover from the railroad company the whole amount of the loss for which the latter was responsible under its contract. The plaintiff could recover only one satisfaction for the loss; and if the amount recovered from the railroad company, increased by the sum collected from the insurance companies, was more than sufficient for its just indemnity, the excess would be held by it in trust for the insurance companies. The inquiry in this action is as to the amount for which the railroad company is bound on its contract with the plaintiff, and the recovery is not affected or limited by the amount collected from the insurance companies. As said in *Railroad Co. v. Jurey*, 111 U. S. 584, 593; 4 Sup. Ct. Rep'r, 566, which was a suit against a carrier: "Although the suit is brought for the use of the insurer, and it is the sole party beneficially interested, yet its rights are to be worked out through the cause of action which the insured has against the common carrier. The legal title is in the insured, and the carrier is bound to respond for all the damages sustained by the breach of his contract. If only part of the loss has been paid by the insurer, the insurer is entitled to the residue." See, also, *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 117 U. S. 312, 320, 321; 6 Sup. Ct. Rep'r, 1176. This is because, as said by Chief Justice Shaw in *Hart v. Railroad Corp.*, 13 Metc. (Mass.) 99, the liability of the railroad company is, in legal effect, first and principal, and that of the insurer secondary, not in order of time, but in order of ultimate liability. So in *Weber v. Railroad Co.*, 35 N. J. Law, 409: "Notwithstanding such payment, an action will lie by the insured against the railroad company. The insurance is to be treated as a mere indemnity, and the insured and insurer regarded as one person; therefore, payment by the insurer before suit brought cannot affect the right of action." To the same effect are numerous other cases. *Fretz v. Bull*, 12 How. 466, 469; *Hall v. Railroad Cos.*, 13 Wall. 367, 370; *Merrick v. Van Santvoord*, 34 N. Y. 208; *Connecticut F. Ins. Co. v. Erie R. Co.*, 73 N. Y. 399; *Clark v. Wilson*, 103 Mass. 219; *Hayward v. Cain*, 105 Mass. 213; *Gales v. Hailman*, 11 Penn. St. 515; *Perrott v. Shearer*, 17 Mich. 48; *Insurance Co. v. Frost*, 37 Ill. 333; *Connecticut Mut. Life Ins. Co.*

v. New York & N. H. R. Co., 25 Conn. 265; *Swarthout v. Railroad Co.*, 49 Wis. 625; 6 N. W. Rep'r, 314. The principle is thus stated by Lord Blackburn in *Burnand v. Rodocanachi*, L. R., 7 App. Cas. 333, 339: "The general rule of law (and it is obvious justice) is that, where there is a contract of indemnity (it matters not whether it is a marine policy, or a policy against fire on land, or any other contract of indemnity), and a loss happens, any thing which reduces or diminishes that loss reduces or diminishes the amount which the indemnifier is bound to pay; and, if the indemnifier has already paid it, then if any thing which diminishes the loss comes into the hands of the person to whom he has paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to be recouped, by having that amount back." *Castellain v. Preston*, 11 Q. B. Div. 380. It results that the court was right in holding that the insurance upon the cars and the collection by plaintiff of the insurance money were immaterial matters in this litigation. The action was well brought in the name of the plaintiff, pursuant to its agreement with the insurance companies.

3. It is assigned for error that the court refused to instruct the jury that the agreement sued on was void, as against public policy, because of the exclusive rights given to the plaintiff for the term of fifteen years in respect to drawing-room and sleeping-cars furnished by it to the defendant, supplemented by the stipulation that the defendant would not "contract with any other party to run the said class of cars on and over said lines of road during said period of fifteen years;" and because the law will not permit individuals to oblige themselves by a contract, when the thing to be done or omitted is injurious to the public. *Navigation Co. v. Winsor*, 20 Wall. 64, 66; *Chappel v. Brockway*, 21 Wend. 157, 159. Such a contract, it is argued, is in general restraint of trade. The authorities cited in support of this contention have no application to such a contract as the one before us. The defendant was under a duty, arising from the public nature of its employment, to furnish for the use of passengers on its lines such accommodations as were reasonably required by the existing conditions of passenger traffic. Its duty, as a carrier of passengers, was to make suitable provisions for their comfort and safety. Instead of furnishing its own drawing-room and sleeping-cars, as it might

have done, it employed the plaintiff, whose special business was to provide cars of that character, to supply as many as were necessary to meet the requirements of travel. It thus used the instrumentality of another corporation in order that it might properly discharge its duty to the public. So long as the defendant's lines were supplied with the requisite number of drawing-room and sleeping-cars, it was a matter of indifference to the public who owned them. *Express Cases*, 117 U. S. 1, 24, 25; 6 Sup. Ct. Rep'r, 542, 628. We cannot perceive that such a contract is at all in restraint of trade. The plaintiff was at liberty, so far as that contract was concerned, to make similar arrangements for the accommodation of passengers on all other railroads in the country, even those that are rivals or competitors in business with the defendant. It is, however, a fundamental condition in all such contracts that their provisions must not be injurious to the public. As said by this court in *Cherokee Nation v. Railway Co.*, 135 U. S. 641, 657; 10 Sup. Ct. Rep'r, 965, a railroad is a public highway, established primarily for the convenience of the people and to subserve public ends. A railroad corporation cannot, therefore, without the sanction of the government creating it, make any agreement that militates against the public convenience, or that will defeat the public objects for which it was established. If the contract in suit was liable to objection upon these grounds, a different question would be presented for our determination. But we are of opinion that public policy did not forbid the railroad company from employing the Pullman Southern Car Company to supply drawing-room and sleeping-cars to be used by its passengers, and, as a means of inducing the plaintiff to perform this public service and to incur the expense and hazard incident thereto, from giving it an exclusive right to furnish cars for that purpose. The defendant did not, by such an agreement, abandon the duty it owed to the public; for the cars so furnished, while in its possession and use, became, as between it and its passengers, its own cars, subject to such regulations as it might properly establish for the comfort and safety of passengers on its trains. *Pennsylvania Co. v. Roy*, 102 U. S. 451, 457. And the contract is to be interpreted in view of the condition, implied by law, that the plaintiff should furnish cars not only adequate and safe but sufficient in number for the use of the public desiring to travel over

the defendant's roads. These conditions exist independently of the particular clause giving the railroad company the option to terminate the agreement at the end of five or eight or eleven years. Being imposed by law, as necessary to the public interests, they could not be dispensed with by agreement of the parties. The designation of particular periods of time, at the end of either of which the defendant might, of right and upon notice, terminate the agreement, did not tie its hands so that it could not continuously discharge its duty to the public in respect to the adequacy or safety of cars in which it conveyed passengers. The stipulation, therefore, that the plaintiff, not being in default, should have the exclusive right for fifteen years to furnish drawing-room and sleeping-cars for the defendant's use, and that the defendant should not, during that period, contract for cars of that kind with any other party, rightly construed, is not unreasonable, and, properly performed, will promote the convenience of the public, in that it enables the defendant to have on its lines, at all times, and as the requirements of travel demand, drawing-room and sleeping-cars for use by passengers. It is a stipulation that does not interfere in any degree with its right and duty to disregard the contract whenever the plaintiff fails in furnishing cars that are adequately safe and sufficient in number for the travel on defendant's lines. The suggestion that the agreement is void, upon grounds of public policy, or because it is in general restraint of trade, cannot, for the reasons stated, be sustained.

Besides, it is not clear that the agreement is so far indivisible that the stipulation giving the plaintiff the exclusive rights in question, and binding the defendant not to make similar contracts with other parties for drawing-room and sleeping-cars to be used on its lines, cannot be separated from the other provisions. If that stipulation were held to be void upon the grounds suggested, we should be inclined to hold that, as between the parties, the provision making the railroad company liable for loss or damage, arising from casualty or accident, to the plaintiff's cars, while in the possession of and subject to use by the defendant, remained in force. *Erie Ry. Co. v. Union Locomotive & Exp. Co.*, 35 N J. Law, 246.

4. There can be no doubt that the railroad company was, under the evidence, liable to the plaintiff on account of the loss by fire

of the Louisiana. The contract covered cars that were assigned by the plaintiff to the defendant's use, while they were in actual transit over its lines or over the lines of other companies on whose roads they were sent by the defendant. It equally covered such as were under the defendant's immediate control while in its own yards or sheds for the purpose simply of being cleansed and re-supplied for another trip when the defendant chose to put them into actual service. That was the situation at the time of the loss by fire of the Louisiana. It had a few hours before come from active service on the defendant's road, and, but for its destruction, would have been put upon the road for another trip in the afternoon of the very day of the fire. Such a case is plainly embraced by both the letter and spirit of the contract. A peremptory instruction to find for the plaintiff in respect to the Louisiana would not have been erroneous.

5. The remaining instructions involved the liability of the defendant on account of the destruction by fire of the car Great Northern. The defendant asked the court to instruct the jury as follows: "That if the jury believe from the evidence that the defendant company, by arrangement with the plaintiff company, in the year 1879, set apart at their depot in the city of New Orleans a certain portion of said depot for the exclusive use and benefit of plaintiff as a repair shop, wherein the cars of the plaintiff mentioned in the contract sued on were to be repaired by the plaintiff at its own expense, and the said space was inclosed, fastened and locked, and the keys thereof were kept by the plaintiff or its agents so that access thereto by the defendant or its agents was only such access as was necessary to enable the defendant company to take possession of repaired cars when tendered for service by the plaintiff, and that at the time of the fire, on the 27th of May, 1882, the car Great Northern was in the said repair shop, and had been there for a period exceeding six months for the purpose of being repaired, and that at the time of the fire said car had not been tendered for service as a car completely repaired and equipped for service to the defendant, although ready to be tendered, then the jury must find that the defendant is not liable for the loss of the said car Great Northern, or for any damage thereto by fire aforesaid." This instruction was refused, except with this modification: "Unless the jury further find that the

said car had been withdrawn from the dominion of the contract, and it was held, according to the understanding of both parties, for some other purpose — that is, for some other purpose than those of the contract.” The court, in its general instructions to the jury, said: “It was undoubtedly competent for the parties to this action to have withdrawn their cars from the dominion of the contract, but to constitute such a withdrawal there must be the intent of the plaintiff to retain them for some purpose other than to continue their use under the contract; and if the jury find that there was a placing of the cars in the separate room or apartment with the intent, on the part of the plaintiff, to use them independently of the contract, and not under it, then the defendant would not be liable for their destruction. If, on the other hand, the jury find that though there was a placing of the cars in the separate room or apartment, but with the intent to continue to use them under the contract, and to hold them so placed merely for the purpose of repair under the contract, and the defendant shared this intent, then the defendant would be responsible for their destruction by fire. In determining this question the jury will consider all the facts and circumstances established, including the fact that the cars remained on the tracks of the defendant, and will further consider whether the defendant is shown to have any relations to these cars except under the contract.”

The defendant also asked this instruction: “That if the jury believe that the two cars, Louisiana and Great Northern, were destroyed by fire at the depot of the defendant company, while the said cars were not in actual use and service by the defendant company, then they must find a verdict for the defendant.” The court refused to give this instruction, saying: “I refuse that instruction, provided you find that they were being repaired under the contract. That’s the test which the court gives you all the way through — whether these cars, according to the meaning of these parties, were or were not under the contract, the contract providing for repairing as well as running.” The court having, in this connection, instructed the jury, at plaintiff’s request, that “the said contract covers the said cars while standing on the tracks of the defendant in the yards, and under the sheds used for storing cars while not in transit,” said that the contract covered the cars “while standing on the tracks of the defendant in its

yards and under the sheds used for storing cars while not in transit, but while held for transit or repair on defendant's tracks under the contract."

It was not error to refuse that one of defendant's requests for instructions predicated upon the theory that its liability for the loss of a car from accident or casualty depended upon such car being, at the time, in its "actual use and service." Of course, the defendant meant by this instruction, and the jury would have understood, that a car was not in actual service while it was standing on the defendant's tracks "between trips." That theory would have relieved it from responsibility for the loss of the Louisiana, although that car had come from the road only a few hours previous to the fire, and was, when destroyed, in the immediate possession and control of the railroad company, being cleansed and prepared for the use of passengers on another trip to be entered upon in the afternoon of the day of the fire. We have already said that this interpretation of the contract was unsound. But we are of opinion that the court below erred in not giving, without modification, the first of the above instructions asked by the defendant. By the terms of the agreement, the railroad company was bound, upon request, to make promptly such repairs of the cars furnished to it as might from time to time become necessary, and, without request, to make such as their safety demanded. The length of time the Great Northern was in the repair shops indicated either that repairs were necessary to its safety, or that "the requirements of travel" did not make it necessary to assign another sleeping-car in its place. But, whatever may have been the fact in that regard, the Great Northern was not, within any fair interpretation of the contract, in the possession or under the control or supervision of the defendant, or subject to be used under and for the purposes of the contract, while it was in a repair shop of which the plaintiff had the keys, and to which the defendant's employees had no access. We do not mean to say that a car, furnished by the plaintiff, ceased to be under "the dominion of the contract" while it was being repaired as provided for in the contract. On the contrary, if the Great Northern had been destroyed by fire, the result of accident or casualty, while in the possession of the defendant, undergoing ordinary repairs, it would have been liable for the loss. No doubt the defendant's assent to

liability for losses or damages resulting from accident or casualty was because the agreement contemplated that the cars furnished to and held by it under the contract would be, all the time, whether they were on its road in actual service, or in its shops undergoing repairs, in its immediate possession and control, thereby insuring the safety of the cars, so far as the vigilance of its own employes was concerned, from loss or damage from the causes named. But the Pullman Company became dissatisfied with the manner in which the repairs were made by the defendant, and undertook itself to make such repairs, in a shop set apart to it for that specific purpose, and placed under its exclusive control, and to which the defendant's agents had no access. The defendant agreed to be liable for loss or damage, from accident or casualty, if the loss occurred while the cars were in its possession, subject to be used by it or subject to its control, care and supervision, but not otherwise. That is the meaning of the contract. Looking at the whole agreement, and giving full force to all its provisions, the defendant cannot be held to have agreed to be liable for loss or damage accruing from accident or casualty, while the cars were in the exclusive possession and subject to the entire control of the plaintiff, and not subject to be used, controlled or cared for by the defendant, until the plaintiff chose to surrender its exclusive possession, and return the cars to the possession and control of the railroad company. Upon the theory sanctioned by the court below, we do not perceive but that the defendant would have been liable for the loss of the Great Northern, if it had been removed to the shops of the Pullman Palace-Car Company at Pullman, Ill., to be repaired, and, after being there from October, 1881, until May, 1882, had been burned up while in those shops, a result that surely could not have been contemplated by the parties. In our opinion, the evidence did not disclose a case of liability under the contract, upon the part of the defendant, for the destruction by fire of the Great Northern, and an instruction to the jury to that effect would not have been improper.

The judgment is reversed, and the cause remanded for a new trial in conformity with this opinion.

Blatchford, J., did not sit in this case or take any part in its decision.*

* Reported in 11 Sup. Ct. Rep'r, 490; 120 W. S. 79.

Corporations—contracts in restraint of trade.—As to that feature of the contract involved in the foregoing case and claimed to be in restraint of trade, see *Central Trans. Co. v. Pullman's Palace-Car Co.*, ante, and note.

LAING V. MAYOR, ETC., OF CITY OF AMERICUS.

(Supreme Court of Georgia, March 4, 1891.)

1. **MUNICIPAL CORPORATIONS. LICENSE TO OCCUPY A PORTION OF STREET.** Without express statutory authority, a municipal government cannot grant to any person the right to erect and maintain in a public street a structure, such as a permanent fish-box, for his private and exclusive use.

2. **SUMMARY ABATEMENT OF NUISANCE.** The charter of Americus invests the city council with full power to clear the streets of all obstructions, and this power may be exercised summarily, and without granting a preliminary hearing, after notice to remove, and refusal.

3. **LICENSÉ TO CARRY ON A BUSINESS CONFERS NO RIGHT TO USE STREET THEREFOR.** A license from the city to carry on the business of a fish-dealer, etc., gives no vested right to keep a box in the street, and use it in the business.

4. **PRACTICE. DIRECTING A VERDICT.** Where the whole case turns upon a question of law, which is decisive of its merits, the court may direct a verdict for the defendant. Even if this be irregular, it is no cause for a new trial, where a recovery would be impossible.

ERROR from superior court, Sumter county, Fort, judge.

Simmons & Kimbrough, L. J. Blalock and Hoyl & Parks for plaintiffs in error. *B. P. Hollis, E. A. Hawkins and Harrison & Peoples* for defendant in error.

BLECKLEY, C. J. The plaintiff located his fish-box, a structure nine feet long, three feet wide, and two and one-half feet high, in one of the public streets of Americus, intending it to be permanent, and believing that he had the consent of the city council so to do. Certain members of the street committee of the council gave their consent expressly, co-operated with him in selecting the site, and gave direction as to how and where the contrivance for drainage of the box should be placed. Considerable expense was incurred by the plaintiff in procuring the box, putting it in position, and supplying it with the needful apparatus for drainage. He was a licensed fish-dealer and restaurant-keeper, and renewed his license

while using the box in connection with his business. The renewed license had a considerable length of time to run when the city, in January, 1888, after the box had stood in the street for about fifteen months, removed it without his consent, and in spite of his objection. This was not done, however, until after he had been notified to remove it, and had positively refused to do so. Having no place on any premises under his control on which such a box could be located, he could make no further use of it in his business, and the result was that his business as a fish-dealer was broken up. He brought his action against the city for damages, and after hearing all the evidence offered by both parties, the court directed the jury to return a verdict for the defendant.

1. It is not pretended that the municipal government of Americus had any express statutory authority to farm out the public streets to fish-dealers or to any one else. Without such authority, they could not grant to any citizen the right to maintain a permanent structure for private use in any of the streets. 2 Dill. Mun. Corp., § 660. Any license, therefore, which the city granted, or could grant, to the plaintiff to occupy the street with this fish-box was necessarily temporary and revocable. Even if both parties had intended it to be permanent, such intention would be of no effect. So far from there being cause for complaint that the structure was allowed to stand only fifteen months, it was matter of indulgence to the plaintiff, and something to which he had no legal right, that it was allowed to be placed there at all. His real grievance is that he made a mistake in supposing that he was securing a right which the city authorities had no power to confer upon him. In dealing with public agents, every person must take notice of the extent of their powers at his peril; and only by gross neglect to inform himself could any one having the requisite capacity to deal in fish fall into the error of supposing that he could acquire for his own exclusive use the right to occupy permanently sixty-seven cubic feet of space in a public street. It matters not that a permanent structure for private enjoyment in a street or highway is confined to a part little used, or not used at all; it becomes a nuisance, as an encroachment upon the public right. *Elliott Roads & S.* 477 et seq.; *Wilbur v. Tobey*, 16 Pick. 177; *Emerson v. Babcock*, 66 Iowa,

257; 23 N. W. Rep'r, 656; *State v. Berdetta*, 73 Ind. 185. It was no reason for not removing the obstruction that the plaintiff had incurred expense in erecting and maintaining it. *Winter v. City of Montgomery*, 83 Ala. 589; 3 South. Rep'r, 235. The suggestion that the city would be estopped, as in *City of Atlanta v. Gas-Light Co.*, 71 Ga. 107, is without relevancy, for in that case the gas company had a charter from the legislature; the city had power to give consent, and consequently could be estopped from denying that it had given it; and where the power to consent exists, and has been exercised, the city may be estopped to revoke needlessly and to the injury of the other party. *Town of Spencer v. Andrew* (Iowa), 47 N. W. Rep'r, 1007.

2. The charter of the city of Americus, section 20, declares that the said mayor and council of Americus shall have full power and authority to remove, or cause to be removed, any building, posts, steps, fence or other obstruction or nuisance, in the public streets, lanes, alleys, sidewalks or public squares of the city. Acts 1873, p. 114. This power was ample, and was duly exercised in the present instance. The plaintiff was notified, according to the city ordinance, to remove the box, and refused to do it. On the facts in evidence, looking to his testimony alone, there was good cause for removing it, and his complaint that he was denied a hearing by the city council is of no significance. To abate nuisances elsewhere than in the public streets, a preliminary hearing would generally be necessary; but to clear the streets of palpable obstructions, no such hearing is required. The plaintiff has not had a full hearing in the superior court, and has failed to show any legal reason why his box should remain in the street. It was not the want of a hearing, but the lack of any legal right, that exposed him to loss.

3. The plaintiff's license as a fish-dealer or a restaurant-keeper did not confer any right upon him to use the street permanently and exclusively as an annex to his premises and an adjunct to his business. We have referred to the transcript of the record on file here in the case of *City of Atlanta v. Dooly*, 74 Ga. 702, and find that the bill-board involved in that case was located upon private property extending along the margin of the street, and not upon the street itself or sidewalk. It was that circumstance that made the ruling in that case correct. The license granted to

Dooly as a bill-poster was not claimed to comprehend the right of maintaining bill-boards in the public streets, but only to cover the privilege of exercising the business on adjacent lands. The city officials seized and removed a board thus located. No act of merely clearing obstructions out of a street was under consideration in that case.

4. After all the evidence was in, the plaintiff's right to recover turned exclusively upon a question of law. That question was against him. It was not possible for the jury to render any verdict in his favor which could be upheld. This being so, no good reason occurs to us why the court could not direct a verdict for the defendant. But, even if such direction was irregular, it was harmless, and it would be idle to require a new trial. *Hobby v. Alford*, 73 Ga. 791; *Cothran v. City of Rome*, 77 Ga. 582. Construing the evidence most favorably for the plaintiff, and treating all conflict in it as settled adversely to the defendant, the verdict was correct. Judgment affirmed.*

Municipal corporation — permitting use of street for private purposes.— A municipal corporation cannot, unless specially authorized, grant the use of its streets or public places for any private purpose. *Glaessner v. Anheuser-Busch Brewing Assn.*, 2 Am. R. R. & Corp. Rep. 430; *Bateman v. City of Covington*, 3 Am. R. R. & Corp. Rep. 508, and note.

SOUTHERN KANS. RY. CO. v. WALSH.

(Supreme Court of Kansas, March 7, 1891.)

1. **CARRIERS. INJURY TO PASSENGER. DERAILMENT. PRESUMPTION OF NEGLIGENCE.** Where a passenger brings an action to recover for injuries resulting from the derailment of the train on which he was riding, and therein shows the occurrence of the accident and the extent of his injuries, a *prima facie* case is made out in his favor, and the burden is thrown upon the railway company to show that the injury did not result from a want of care upon its part.

2. The *prima facie* case thus made out may be overthrown by showing that the injury resulted from inevitable accident, or something against which no human prudence or foresight on the part of the company could provide.

3. **DEGREE OF CARE TO BE EXERCISED FOR THE SAFETY OF PASSENGERS.** The railway company owes a higher duty to its passengers than mere ordinary care and foresight in the construction and maintenance of its tracks. It is

* Reported in 18 S. E. Rep'r, 107.

bound to exercise the highest degree of practicable care; not the utmost possible precaution that might be imagined, but the highest care and best precaution known to practical use, and which are consistent with the mode of transportation adopted.

4. PRACTICE. SUBMISSION OF QUESTION TO JURY. The question of how general or how particular the question of fact to be submitted to the jury, in any particular case, should be, rests largely in the sound judicial discretion of the trial court.

5. ADMISSION OF IMPROPER EVIDENCE. The admission of improper evidence is not a ground of reversal, where the special findings show the testimony elicited to have been immaterial.

6. EXCESSIVE DAMAGES. A verdict for \$5,246 was not held excessive where plaintiff, who was thirty-one years of age and earning \$2,500 a year, had sustained a fracture of the clavicle, the dislocation of three ribs, an injury to the lungs and various cuts and contusions, had suffered great pain, and the injuries were permanent, would probably shorten life and greatly impair the plaintiff's ability to labor and endure.

ERROR from district court, Montgomery county, George Chandler, judge.

Geo. R. Peck, A. A. Hurd and Robert Dunlap for plaintiff in error. *William Dunkin* for defendant in error.

JOHNSTON, J. This was an action for injuries received by L. C. Walsh while a passenger on one of the trains of the Southern Kansas Railway Company, *en route* from Moline to Independence. The train was derailed between the points mentioned, and he alleged in his petition that the track of the railroad between the points named was out of repair and dangerous for travel; that the company willfully and wantonly permitted the rails to become battered and worn, the cross-ties rotten and unfit for use, and negligently failed to use a proper quantity and quality of ballast on the track; and that on February 14, 1887, when the derailment occurred, the road was utterly unsafe and unfit for use. He avers that, as a result of this condition, the train was thrown from the track when running at a high rate of speed, and he was injured, as follows: "Severe wound on the left side of the head, laying open the scalp for two inches in length, cutting through to the bone; also severe contused injury of left shoulder, and to the entire scapular region of the left shoulder, tearing the *scapula* from its muscular attachments, and tilting it forward; and also causing a separation of the first, second and third ribs from their

sternal attachment; also causing a separation of the clavicle from its sternal attachment, throwing it forward and upward, permanently dislocating the said clavicle; also a severe contusion of the left lung, causing spitting and coughing of blood; also bruises in face and over parts of the body." A verdict was rendered in favor of Walsh, in which the jury assessed his damages at \$5,246.

It is first insisted that the evidence was insufficient to sustain the verdict rendered, or to show any liability whatever on the part of the company. It appears that on February 14, 1887, Walsh purchased a ticket at Moline for a passage from that point over the Southern Kansas railroad to Independence, paying therefor the sum of \$1.10. The train was behind time, and when it arrived at Moline he entered one of the coaches, seated himself and proceeded on his journey until they reached a point about two miles east of Longton, where the train was derailed. Some of the coaches were overturned, down an embankment, and Walsh was severely injured. There is testimony tending to show that the track was in bad condition where the accident occurred; that the ties were unsound, and not properly ballasted. It is shown, and conceded, that the immediate cause of the derailment was the breaking of a rail. It had been put in the track only two days before, to replace one which had also been broken at the same place. The company contends that an examination of the broken place disclosed no flaws or defects which could have been detected by the exercise of the utmost caution and foresight, and that, therefore, the accident was fortuitous and unavoidable, for which it should not and could not be held liable. On the other side, it is contended that, although there were no apparent flaws or cracks in the rail, it was broken, because it was not sufficiently supported by ties and ballast. Upon this question there is a sharp conflict in the testimony. The section-men who put in the rail two days before the occurrence of the wreck testified that the rail was placed on a solid bearing; that ties were placed under the end of the rail which broke off, and that soil and ballast were tamped about the ties so as to make the track solid and secure. On the other hand, there is positive testimony offered by Walsh that the rail which broke extended about two feet over a cattle guard, the frame-work of which was solid, and that the end which projected beyond the cattle-guard was spiked to ties, but that the

ties were drawn or lifted from the ground at one end about six inches, and that the soil and ballast were not filled in and tamped under and about them. If the track was in this condition, it was dangerous and unfit for use; and this defect would fairly account for the breaking of the rail and the wreck of the train. In view of this testimony, and the finding of the jury that the section-men did not fill the space between the tie and the ground, but left the end of the rail with the ties attached suspended several inches from the ground, and that the ties at the place of the accident were unsound, we cannot say that the verdict is without support. The company are not insurers of their passengers, nor liable for injuries resulting from unavoidable accident in the operation of passenger trains; but there is testimony tending to show a great lack of care in providing a safe road-bed and track, and, "it the defendant could have prevented the accident by the utmost human sagacity or foresight with respect to their track, then the defendant is liable." *Railroad Co. v. Hand*, 7 Kans. 392.

It is also contended that there was error in permitting testimony to be offered by Walsh in regard to the condition of the track at other points than where the wreck occurred. Of course, testimony of defects which did not cause the derailment nor contribute to the injury was not admissible. An examination of the record indicates that the purpose of the court was to confine the testimony to the condition of the track in the immediate vicinity of the place, and near to the time where and when the train was derailed. The inquiry as to the condition of the company's track was considerably extended by both parties, and in many cases without objection, for the purpose of determining the real cause of the wreck; but as the trial proceeded it soon became evident to all that the breaking of the rail caused the derailment of the cars, and the findings of the jury showed that they attributed the accident to this cause; and, looking at the testimony and findings together, we see nothing substantial in any of the objections to the admission of evidence.

Complaint is also made that the court erred in refusing to submit three special questions which were asked. No error was committed in this respect. A long list of particular questions was submitted and answered, and, so far as any facts inquired about in those refused were proper and material, they were covered

by the questions that were submitted and answered. The principal question refused was: "Could any reasonable and ordinary foresight have anticipated the breaking of the iron rail after it had been left in the track by the workmen?" In the first place, the question is somewhat general, while only particular questions of fact are required to be submitted; and the question of how general or how particular the question of fact to be submitted to a jury, in any particular case should be, rests very largely in the sound judicial discretion of the trial court. *Foster v. Turner*, 31 Kans. 62; 1 Pac. Rep'r, 145. Then, again, as we have seen, the company owes a higher duty to its passengers than mere ordinary care and foresight in the construction and maintenance of its tracks. It must use the most exact diligence, and is answerable for any negligence, however slight. It is bound to exercise the highest degree of practicable care; not the utmost possible precaution that might be imagined but the highest care and best precaution known to practical use, and which are consistent with the mode of transportation adopted. *Railroad Co. v. Hand*, supra; 2 Wood Ry. Law, 1088.

There is also complaint that the court erred in the instructions given to the jury. The charge was very elaborate, calling attention to some of the evidence, and it is claimed that in doing so the court indicated its opinion of the facts, and improperly influenced the jury. A reading of the entire charge satisfies us that the court expressed no opinion on the facts, and that the company was not prejudiced by the course taken. The trial judge simply called attention in a general way to the theories advanced by the respective parties, and the testimony offered in support of their theories, without indicating his view on any disputed point in the testimony. Besides, he repeatedly stated to the jury that he did not intend to express any opinion on the facts, and told them that they were the exclusive judges of the facts established by the evidence in the case, the credibility of the witnesses, and the weight to be given to the testimony of each.

Special objection is taken to an instruction a portion of which reads as follows: "I may likewise say to you there is still another rule applicable to this case: That if you find from the evidence in this case that the plaintiff in this action was free from fault, and was injured, then the law presumes negligence on the part of

the defendant." It is contended that this instruction was erroneous and misleading, and permitted the jury to find the company guilty of negligence, and liable therefor, on the mere evidence that the plaintiff was injured. It is conceded that, if the court had added to this instruction that if the jury found that Walsh was a passenger on the train of the company, and was injured on account of a defect in the track or some of the appliances of the road or its machinery, then the presumption of negligence would arise; but, as injuries frequently happen without any fault or misconduct on the part of the company or its employees, that, therefore, the instruction was erroneous and prejudicial. The instruction complained of is not to be taken by itself, and without reference to the other portions of the charge in which it is found. The court expressly stated to the jury that the burden rested on the plaintiff to show that the injury resulted from the negligence of the company, and that negligence could not be presumed. The part of the charge criticised referred to the presumption which arises where a collision between railway trains occurs, or where a train is derailed and passengers thereon are injured. It is well settled by the authorities that in such cases a *prima facie* presumption of negligence on the part of the railroad company arises, which throws the *onus* upon the company of disproving a want of care on its part. Proof of the occurrence of the accident, and the extent of the passenger's injury, makes a *prima facie* case in his favor; but this may be overthrown by showing that the injury resulted from inevitable accident, or something against which no human prudence or foresight on the part of the company could provide. *Breen v. Railroad Co.*, 109 N. Y. 297; 16 N. E. Rep'r, 60; *Railway Co. v. Napheys*, 90 Penn. St. 135; *Stokes v. Saltonstall*, 13 Pet. 190; *Railroad Co. v. Pollard*, 22 Wall. 341; *Smith v. Railroad Co.*, 32 Minn. 1; 18 N. W. Rep'r, 827; *Railroad Co. v. Anderson*, 6 Amer. & Eng. Ry. Cas. 407; *Hipsley v. Railroad Co.*, 27 Amer. & Eng. Ry. Cas. 287; *Railroad Co. v. Walrath*, 38 Ohio St. 461; *Bowen v. Railroad Co.*, 18 N. Y. 408; *Feital v. Railway Co.*, 109 Mass. 398; *Railway Co. v. Findley*, 76 Ga. 311; 2 Wood Ry. Law, 1096; *Patt. Ry. Acc. Law*, 438, and cases cited. The instruction complained of should have required a finding by the jury that the injury resulted from the derailment; but this fact was not disputed, and, as the derail-

ment is conceded to have been caused by a broken rail in the track of the company, the omission is unimportant. In other portions of the charge the jury are advised that, if the derailment was an inevitable accident, and not the fault of the company, the law will hold it blameless and free from liability. The degree of care required of the company and of Walsh, and the rules of law applicable to the case under the evidence that was given, were fairly stated, and we find nothing in the charge which requires a reversal.

One other objection remains, and that is that the damages awarded are excessive. Only compensatory damages were allowed, and the amount of the allowance (\$5,246) was itemized by the jury, as follows: "For suffering in the past, \$1,000; for suffering in the future, \$1,000; for inability to perform physical labor, \$3,000; for physician's bills, \$150; for board and lodging \$42; for loss of time, eighteen days, at \$3 per day, \$54." While it appears to us that the amount awarded is liberal, we cannot say that the jury acted corruptly, or under the influence of passion, partiality or prejudice. At the time of the accident, Walsh was thirty-one years of age, in excellent health, and held the position of United States pension examiner, the compensation of which was about \$2,500 per year. Dr. McCulley, who examined him shortly after the injury occurred, found a wound on the back of his head two inches in length, and half an inch deep; a fracture of the clavicle bone, near the middle breast-bone; a complete fracture of the first, second and third ribs; the *scapula* was thrown out of its natural position, and one of the large muscles which held the *scapula* was torn from its attachment; the *pleura* which surrounds one of the lungs was ruptured; and he also found a continual coughing, and an occasional coughing up of blood. On a subsequent examination, shortly before the trial, the same witness stated that he found a vesicular condition of the lungs, and inability to expire air, and that it was his opinion that his ability for labor was greatly impaired, and perhaps to the extent of one-half; that the effect of his injury would be to render him liable to attacks of asthma and diseases of the lungs, and to shorten his life. Dr. Masterson, one of the surgeons of the railway company, examined Walsh shortly after his injury, and discovered the same fractures and injuries that were found by Dr.

McCulley. He also found that there was an emphysematous condition of the lungs, and that the upper lobe of the left lung was injured. There was also a cough, and bloody expectoration. That, on account of a rupture of the lung tissue, the air escaped and passed through the *pleura* of the lung into the cellular tissues. On another examination, shortly before the trial, he found that there was a dilation of the air vessels, and enlarged condition of the terminal ends of the bronchial tubes, and that, in his opinion, Walsh would never fully recover from the effects of the injuries. Another physician who examined him stated that the effect of the injury would be to weaken his lungs, shorten his life, and occasion him pain and suffering. Walsh testified that he had suffered great pain from the injuries until the wounds were healed and the bones united; that the injuries had greatly affected his general health; that he had continuous pain in the region of his kidneys, a bloody discharge with his urine, a continuous cough, with pain in the lungs; that his powers of endurance were greatly lessened, and his ability to perform manual or mental labor was not more than one-half of what it was prior to the injury. The testimony shows that the injury, which has already caused Walsh great pain and suffering, is of a permanent character, that it greatly impairs his ability for labor, will subject him to discomfort and pain during the future, and render him less able to resist or recover from other diseases hereafter. In view of the age, former good health and earning capacity of Walsh, and his condition as shown by the testimony referred to, we do not feel warranted in interfering with the verdict upon the ground that the award of damages is excessive. The judgment of the district court will be affirmed. All the justices concurring.*

1. Railroad accidents — derailment of car — presumption of negligence.— That negligence may be presumed from the derailment of a car in which a passenger is riding, see *Arkansas Midland R. Co. v. Canman*, 2 Am. R. R. & Corp. Rep. 311, and note; *Ohio, etc., R. Co. v. Voight*, 123 Ind. 288; 23 N. E. Rep'r, 774; *Gleason v. Va. Midland R. Co.*, post.

2. Derailment — calf on track — neglect to fence — pleading.— Where the derailment was caused by a collision with a calf on the track, which could have been seen six hundred feet in advance of the train, and the railroad company failed to fence its track, having that right, it is sufficient to show negligence. *Gulf, etc., R. Co. v. Wilson*, 79 Tex. 371; 15 S. W. Rep'r, 380. In such case an averment that the car in which plaintiff was riding was derailed

* Reported in 26 Pac. Rep'r, 45.

through the negligence of the railway company and its servants, whereby the plaintiff was injured, is sufficiently specific. *Ibid.*

3. **Derailement while rounding curve—unusual speed.**—In an action against a railroad company for injuries to a passenger, occasioned by a train running off the track, evidence that at the time the accident occurred the train was running down a steep incline on a new and curved track, at an unusual and dangerous rate of speed, is sufficient to cast on defendant the burden of showing that the accident was not caused by any want of care on its part. *Mitchell v. Southern Pac. R. Co.*, 87 Cal. 63; 25 Pac. Rep'r, 245.

4. **Breaking of wheel—derailment—the question of negligence.**—The plaintiff was injured by the derailment of the car in which she was riding. The trial court found as follows: "The cause of the accident was the breaking of a wheel at a point about one hundred and thirty-five miles from New Orleans. It had been carefully inspected at La Fayette, and showed no patent defects. The track was in good order. The train was properly equipped. The train was not running at an unusual rate of speed. The wheel accidentally broke from some hidden defects or cause which human care and foresight could not prevent." It also appeared that shortly before the accident a passenger on the car informed the conductor that he had heard a loud noise and felt a jolt. The conductor at once inspected the car as well as he could both inside and out and perceived no cause for alarm. Held, that the conductor was not negligent in not stopping the car to inspect it further, and judgment was ordered for the defendant. *Frelson v. Southern Pac. R. Co.*, 42 La. Ann. 673; 7 So. Rep'r, 800. In order to impose a liability on a railroad company for the consequences resulting from the omission of an act by one of its employees, the test is not whether, had the act been done, the accident would not have occurred, but whether the act omitted was one which it was the duty of the employe to perform. *Ibid.*

5. **Collision with caboose detached from freight train.**—While a freight train was going up a steep grade on a curved track, the caboose became detached, and running backward collided with the engine of a train following eight minutes behind the first. In a suit for an injury to a passenger on the caboose, held sufficient evidence of negligence. *Louisville, etc., R. Co. v. Paylor*, 126 Ind. 126; 25 N. E. Rep'r, 869.

DAYHARSH V. HANNIBAL & ST. J. R. Co.

(Supreme Court of Missouri, Division No. 1, March 9, 1891.)

1. **RAILROAD COMPANIES. INJURY TO EMPLOYE. NEGLIGENCE OF FOREMAN. FELLOW-SERVANTS.** Where one employe is in charge of a certain part of defendant's railway business, as, in this case, of a round-house, the engines there, and the men necessary to care for them, he is not to be regarded as a fellow-servant of a laborer working at the time under his orders, in respect of acts done by the former in pursuance of his authority over the branch of business under his charge.

2. The fact that such "boss" personally acted in a negligent manner, whereby plaintiff was injured, will not relieve defendant of liability where the act was one within the scope of the authority of the "boss" to direct and supervise as the representative of the master.

3. DUTY OF MASTER TOWARD SERVANT. It is part of the master's duty to use ordinary care to furnish the employe a place to work reasonably as safe as the nature of the employment permits, and not to expose him to any unknown risks, not ordinarily incident to the service.

4. EVIDENCE AS TO PLAINTIFF'S CHILDREN. In an action for personal injuries caused by negligence it is error to admit evidence of the number and ages of plaintiff's children.

5. PRACTICE. ERROR PRESUMED TO BE PREJUDICIAL. Error is presumptively prejudicial. One claiming it to be harmless must affirmatively show it to be so.

A PPEAL from circuit court, Linn county, G. D. Burgess, judge.

The case proceeds for personal injuries, and the defenses are a general denial and contributory negligence. Plaintiff was injured while in defendant's employ at its round-house, Brookfield, Mo. He was a laborer under the direction of Mr. Stephens, who was called the night "hostler." The meaning of this term in this case will be readily comprehended by regarding the locomotive engines as iron horses, and their custody, care, cleaning and management in and about the round-house as devolving on Mr. Stephens, the "hostler," and the men under his orders for that purpose from 7 P. M. of one day to 7 o'clock of the following morning. Plaintiff's evidence tended to prove that on the night of the accident he began work at 7 o'clock, as usual, coaling and watering the engines till nearly 11 P. M., after which Mr. Stephens told him to take the scoop, and get down in the pit and shovel out the cinders. The pit (or trench) was under the tracks running into the round-house. It received the ashes and cinders from locomotives, and, when filled nearly to the level of the rails, was emptied by shoveling the ashes, etc., out to one side. In accordance with the order plaintiff got into the pit, placed his lantern on the rail near him, and began to throw out the ashes with a shovel. It usually took from twenty to thirty minutes to clean out the ash-pit. An engine stood close by (defendant's witnesses say some six or seven yards away) on the same track, and Mr. Stephens was upon the engine. When plaintiff had thus been working for a time stated by him as "three to five minutes" (and by defendant's

witness, Mr. Stephens, as "from five to ten minutes"), this engine started backward toward plaintiff. The tender struck him, and severely crushed his ankle as he was endeavoring to get out of its way. He says he heard no bell or other signal given of its approach; that he had only taken out "three or four scoops," and was reaching for another shovelful, when he was hit; that he cried out, and "tried to dodge it," but failed; and that the tender and part of the engine ran over him. Plaintiff consequently lost his leg below the knee. The testimony as to whether or not a signal was given by ringing the bell (as the engine moved toward plaintiff) was conflicting. Some of defendant's witnesses said it was. The plaintiff said he heard no signal. One of defendant's employees declared that there were other bells ringing on other engines near by, and he could not say whether or not the engine bell in question was rung. In the progress of plaintiff's examination he was allowed (against defendant's objection and exception) to state the number of his children and their ages. The only instruction given by the court on the measure of damages was as follows: "If the jury find for the plaintiff, they should, in estimating his damages, take into consideration the age and situation in life of the plaintiff, his bodily suffering, resulting from the injury received, and loss sustained by reason of the loss of his leg, and the extent to which he is disabled from making a support for himself and family by reason of the injury received, not exceeding \$10,000." The jury found for plaintiff for \$5,008.33, and in due course defendant filed the usual motions and bill of exceptions, to preserve for review the points hereafter discussed. Other facts that may be material will be mentioned in the opinion of the court.

Huston & Parrish for appellant. *A. W. Myers and Stauber & Crandall* for respondent.

BABOLAY, J. (after stating the facts as above). Plaintiff was in defendant's service as a laborer under Mr. Stephens, who as "hostler" had charge and care of defendant's engines in the round-house. As such he also had control and direction of the men necessary to assist him in that work. It is conceded that he had superintending oversight of plaintiff, but the claim is made that he was nevertheless a fellow-servant of the latter in respect

of the movement of the engine which did the damage, and that, consequently, his negligence could not properly furnish a basis for a recovery herein. This is the vital question in the case. A person employed to perform any of the master's duties toward his servant is, while that relation continues, and in respect to such duties, no fellow-servant of the latter. The duties which the master owes the servant may, in many particulars, be delegated to subordinates, and the wide extent of modern business enterprises often necessitates so doing, but that delegation of authority does not relieve the master from a proper discharge of those duties. In this case, Mr. Stephens, when the accident happened, was in entire charge of the round-house where defendant's engines were kept and cared for when not in use, and of the men needed for the work upon and about them. It is not decisive of this case by what name his position, in that regard, was designated, nor whether he had authority to hire and discharge the men under him. He was obviously trusted at the time with the master's power of control of the practical business done at the round-house, of directing the movements of the engines, and of the plaintiff and of the other employes about the place. In exercising that control it was part of his duty to use ordinary care to furnish plaintiff a place to work which should be reasonably as safe as the nature of the employment permitted. *Railroad Co. v. Fox* (1884), 31 Kans. 586; 3 Pac. Rep'r, 320. It was also a part of his duty (in exercising such authority over and direction of the railroad business at the round-house as had been committed to him by the master) to use ordinary care not to expose any man under his orders to risks unknown to the latter, not ordinarily incident to his employment. Starting from these premises, which we imagine cannot be fairly disputed, we go forward in the argument to other positions which are involved in some uncertainty, owing to the conflict of judicial decisions regarding them. We shall not attempt to review the precedents, but will merely state the principles deducible from them which meet our approval. It is undoubtedly within the scope of Mr. Stephens' authority as "night hostler" or "boss" to direct where the engine and tender that struck plaintiff should be placed, and how and when they should be moved over the tracks. In giving directions to that end and seeing to their execution, we think he was performing the master's

part, and as such was the representative of the latter, and not a mere fellow-servant of the plaintiff. If he had expressly directed the engine to be moved down by another upon the plaintiff, in the manner described in the evidence for the latter, the defendant would have been responsible for the act, and we are unable to perceive any logical or reasonable distinction between so directing it and his performing such negligent act himself. It was one which fell within his authority as the master's representative to direct, and it can make no difference in principle whether he did it personally or by another, in its bearings on the rights of the parties to this cause. In view of the result reached on another branch of the case we do not deem it necessary to enlarge upon the reasons for the foregoing rulings at this time, but refer instead to some decisions in which they may be found. *Railroad Co. v. Ross*, 112 U. S. 377; 5 Sup. Ct. Rep'r, 184; *Stone Co. v. Kraft* (1877), 31 Ohio St. 287; *Flike v. Railroad Co.* (1873), 53 N. Y. 549; *Grizzle v. Frost* (1863), 3 Fost. & F. 622; *Reddon v. Railway Co.* (1887), 5 Utah, 344; 15 Pac. Rep'r, 262; *Rima v. Iron-Works* (1890), 120 N. Y. 433; 24 N. E. Rep'r, 940; *Anderson v. Bennett* (1888), 16 Ore. 515; 19 Pac. Rep'r, 765; *Railroad Co. v. Fox* (1884), 31 Kans. 586; 3 Pac. Rep'r, 320. That there was evidence on plaintiff's part sufficient to justify the submission of the issue of defendant's negligence in the backing of the engine upon him while at work without warning is not now seriously disputed. We also regard the question of the contributory negligence of plaintiff as one for the jury on the facts disclosed.

2. But it becomes necessary to reverse the judgment because of the admission of evidence of the number of plaintiff's children and their ages, against the objection and exception of defendant. The admission of such testimony has been positively disapproved by this court (*Stephens v. Railroad Co.*, 1888, 96 Mo. 207; 9 S. W. Rep'r, 589); and by other courts (*Pennsylvania Co. v. Roy*, 1880, 102 U. S. 451; *Kreuziger v. Railway Co.*, 1888, 73 Wis. 158; 40 N. W. Rep'r, 657; *Dreiss v. Friedrich*, 1882, 57 Tex. 70; *Railway Co. v. Powers*, 1875, 74 Ill. 341). Whatever remarks are found in other cases to the contrary (for example, in *Winters v. Railroad Co.*, 1867, 39 Mo. 468; and *Conroy v. Iron-Works*, 1882, 75 Mo. 652) cannot longer be regarded as authoritative. Nothing that took place at the trial can be considered as

curing the error referred to. On the contrary, the only instruction given by the court on the measure of damages rather gave prominence to that piece of irrelevant testimony by alluding to plaintiff's "situation in life," and to "the extent to which he is disabled from making a support for himself and family." In this condition of the record we certainly cannot fairly pronounce the error harmless. The rule on this subject is that error is presumptively prejudicial. It devolves on a party claiming it to be otherwise to show its innocuous character. Here, we think, such showing has not been successfully made, and a reversal must follow.

3. It is not necessary to discuss the other assignments of error. The judgment is reversed, and the cause remanded, with the concurrence of all the judges of this division.*

Railroad companies — negligence of fellow-servants — liability. — See Louisville, etc., R. Co. v. Petty, 2 Am. R. R. & Corp. Rep. 169; Miller v. Southern Pac. R. Co., ante, p. 1.

CONTINENTAL INS. CO. V. VANLUE.

(Supreme Court of Indiana, Jan. 6, 1891.)

1. **INSURANCE. CONDITIONS OF POLICY. INCUMBRANCES.** Payment of a judgment which is a lien on the property of a replevin bail of the judgment debtor, to an agent of the judgment creditors, though no satisfaction is recorded, extinguishes the lien within the meaning of a condition in an insurance policy that it shall be void if there is any legal incumbrance on the property.

2. **MORTGAGE SECURING AGREEMENT TO SUPPORT INSURED'S FATHER.** An instrument whereby a vendee of land agrees to deliver to his vendor one-half of the net proceeds of the land annually, during his life, and which provides that in case of performance of the contract "this mortgage shall be null and void," and that, upon failure to perform, "this mortgage may be foreclosed," is an incumbrance on the land during the vendor's life within the meaning of a provision in an insurance policy that it shall be void if there is any legal incumbrance on the property, though the vendee has always performed his contract.

3. **PLEADING. DEFENSES.** In an action on the policy, where defendant pleads an incumbrance as vitiating the policy, plaintiff cannot raise the issue of waiver under a general denial.

A PPEAL from circuit court, Howard county, Dan Waugh, judge.

* Reported in 15 S. W. Rep'r, 554.

C. E. Hendry, B. C. Moon, J. C. Blackledge and W. E. Blackledge for appellants. *Smith & Kirkpatrick and Elliott & Kirkpatrick* for appellee.

ELLIOTT, J. The appellee recovered judgment upon a policy of insurance issued to him by the appellant, and from that judgment this appeal is prosecuted. The first question for our decision is whether there was such an incumbrance upon the property insured as avoided the policy. The words of the policy are sufficiently comprehensive to include all liens that constitute incumbrances in a legal sense; and if such incumbrance exists, the action must fail, for it is unquestionably the law that a legal incumbrance will defeat the assured, where it is created or suffered in violation of the terms of the contract. *Pfister v. Gerwig*, 122 Ind. 567; 23 N. E. Rep'r, 1041; *Insurance Co. v. Munns*, 120 Ind. 30; 22 N. E. Rep'r, 78. The only point open to debate is whether any incumbrance was created in violation of the provisions of the policy, and to determine this question it is necessary to refer to the facts which bear upon it. On the 17th day of July, 1877, a transcript of a judgment in favor of *Armstrong, Nixon & Co.* against *William F. Giles* was filed in the office of the clerk of the court in which the property insured was situated. On this judgment *William Vanlue*, the appellee's vendor, and then the owner of the property, was replevin bail. After the filing of the transcript, *William Vanlue* conveyed the property to his son, *Albert M. Vanlue*, the appellee in this case. Prior to the filing of the transcript, the judgment creditors entered into a contract with *Giles*, the judgment debtor, in which it was agreed that *William P. Vaile* should collect the rents from property owned by *Giles* and apply them to the payment of the judgment. During the year 1877, *Vaile* collected rents more than sufficient to pay the judgment; but satisfaction was not entered of record until April, 1884. On the 28th day of April, 1883, appellant issued to the appellee the policy of insurance on which the action is founded.

We have assumed in our statement that the policy embraced prior as well as future incumbrances, as this is tacitly conceded by the appellee, and we do not touch upon the question of construction decided in the case of *Insurance Co. v. Munns*, *supra*.

We have also assumed that the rents collected by Vaile under the agreement with the judgment creditors and their debtors were more than sufficient to satisfy the judgment, and this we have done because there is evidence of that fact which we have no right, under a long-settled rule, to disregard. The judgment was originally an incumbrance upon the property of the replevin bail, as our own statute creates a lien against the property of one who enters himself as replevin bail upon a judgment. But it does not follow that a lien continues although there is no satisfaction of record. It would be an inexcusable sacrifice of substance to shadow to hold that a lien continued after payment of the judgment because the formal entry of satisfaction on the record was not made. It is very clear that when the amount of the judgment was paid the lien ceased to exist. *State v. Salyers*, 19 Ind. 432; *Myers v. Cochran*, 29 Ind. 256; *Shields v. Moore*, 84 Ind. 440; *Klippel v. Shields*, 90 Ind. 81; *Chapin v. McLaren*, 105 Ind. 563; 5 N. E. Rep'r, 688. The application of the principle that payment extinguishes a lien to insurance cases is no more than a just extension of it, for such cases fall far within its sweep. *Merrill v. Insurance Co.*, 73 N. Y. 452; *Hawkes v. Insurance Co.*, 11 Wis. 196; *Smith v. Insurance Co.*, 60 Vt. 682; 15 Atl. Rep'r, 353. It is immaterial whether the amount collected by Vaile reached the judgment creditors prior to the time the policy was taken out or not, for, as soon as Vaile received the amount, the replevin bail was released. It is probably true that the bail was released as soon as the contract providing for a collection of rents by Vaile was entered into, inasmuch as the effect of that contract was to extend the time of payment; and if it did have this effect the replevin bail was released, because an extension of time releases one who occupies, as he did, the position of a surety. But, however this may be (we decide nothing upon this point), we think it clear that when Vaile, as the representative of the judgment creditors, received the amount of the judgment, it ceased to constitute an incumbrance within the meaning of the law.

There is, however, another phase of the question whether there was or was not an incumbrance upon the property insured. On the day that the land was conveyed to the appellee, he executed to the vendor a mortgage containing this condition: "The con-

dition of this mortgage is that the said Albert M. Vanlue has taken a conveyance of the above real estate, upon the condition subsequent that he shall furnish to the said William Vanlue a maintenance and support during the life of the latter, which maintenance is agreed to be one-half of the net proceeds of said farm, which is to be delivered annually to William Vanlue. In case of a performance of the contract by the said Albert M. Vanlue this mortgage shall be null and void, and at the death of William Vanlue the same shall be canceled, and said real estate shall vest absolutely in the said Albert M. Vanlue, free from this incumbrance. And the mortgagor expressly agrees to perform the contract above secured, and, upon failure, this mortgage may be foreclosed accordingly." The appellee in all things faithfully performed his contract, and at the time he received the policy, as well as at the time the loss occurred, he was free from fault, having done all that he was bound to do up to that time. If the contract was not a continuing one, we should have no difficulty in applying to the mortgage lien the rule which we have applied to the judgment lien; but, as the contract is a continuing one, terminating only upon the death of the mortgagee, there is much difficulty in reaching a satisfactory conclusion. In almost any other case than that of an action upon an insurance policy the question would be entirely free from difficulty, for the mortgage would unquestionably be regarded as an incumbrance in ordinary cases, such as actions between vendor and vendee and the like. *Richter v. Richter*, 111 Ind. 456; 12 N. E. Rep'r, 698; *Copeland v. Copeland*, 89 Ind. 29; *Wilson v. Wilson*, 86 Ind. 472; *Prescott v. Trueman*, 4 Mass. 627; *Mitchell v. Warner*, 5 Conn. 498-527; *Spurr v. Andrew*, 6 Allen, 420; *Cathcart v. Bowman*, 5 Penn. St. 317; *Post v. Campau*, 42 Mich. 90; 3 N. W. Rep'r, 272; 6 Amer. & Eng. Enc. Law, 639. There is some diversity of opinion as to whether an instrument securing the performance of a contract for support and maintenance can be deemed a mortgage. We think it clear, however, that, whatever name be given the instrument, the effect is the same in all ordinary cases, for an incumbrance is created. *Bryant v. Erskine*, 55 Me. 153; *Bethlehem v. Annis*, 40 N. H. 34; *Soper v. Guernsey*, 71 Penn. St. 219; *Austin v. Austin*, 9 Vt. 420. But decisions in cases concerning deeds and mortgages do not fully control cases where the contro-

very concerns the right to forfeit a policy of insurance, and a close adherence to those decisions would lead to an erroneous conclusion in a case where the issue is whether there has been a forfeiture of a policy of insurance. The ground upon which rests the distinction between contracts of insurance and other contracts is a solid one, for the contract of insurance is, in many essential respects, a peculiar one. There is strong reason for limiting the effect of the word "incumbrance" when employed in policies of insurance, since to give the word a broad meaning would be to do injustice in many instances without excuse or justification. The purpose for which provisions prohibiting incumbrances are written in policies is to create a cause for forfeiture, not to protect the company issuing a policy from a defect in the title of property conveyed to it, nor to vest in it an unincumbered title, and the only just reason for recognizing such prohibitions is that if the property is incumbered, there may be some temptation to the owner to himself burn the property and thus secure the amount of the insurance. It is obvious, therefore, that there should be a distinction between insurance contracts and contracts of a different class. Provisions intended to create a forfeiture, wherever found, are strictly construed in order to avert a forfeiture; but such provisions are restricted with special care and strictness in contracts of insurance; the courts, with an almost unanimous voice, deciding that such contracts, because of their peculiar character, shall be strictly and rigidly construed against the insurance company wherever a strict construction is necessary to prevent the forfeiture of the policy. *Insurance Co. v. Jenks*, 5 Ind. 96; *Grant v. Insurance Co.*, 5 Ind. 23; *Rodgers v. Insurance Co.*, 121 Ind. 570; 23 N. E. Rep'r, 498; *National Bank v. Insurance Co.*, 95 U. S. 673; *Moulton v. Insurance Co.*, 111 U. S. 335; 4 Sup. Ct. Rep'r, 466. We are required by the rules to which we have referred to give the policy before us a very strict construction against the appellant, and to avert a forfeiture, if we can do so without doing violence to the language of the contract. But, liberal as the rule is in favor of the assured, it will not authorize a court to make a contract for the parties nor to disregard one made by the parties themselves. *Havens v. Insurance Co.*, 111 Ind. 90; 12 N. E. Rep'r, 137; *Insurance Co. v. Lamar*, 106 Ind. 543; 7 N. E. Rep'r,

241; McGowan v. Insurance Co., 54 Vt. 211; Supple v. Insurance Co., 58 Iowa, 29; 11 N. W. Rep'r, 716. The duty of the court is to construe the contract, and in this work it must be guided by the rules of law which govern the subject which the contract concerns, and to which it relates. The decisions, as we have indicated, declare that the word "incumbrance" has a limited effect in contracts of insurance, and upon the general doctrine there is little, if any, diversity of opinion. The clash is upon the application of the approved general doctrine, not as to the doctrine itself. Whether the provision declaring that an incumbrance shall forfeit the policy before us is violated by the instrument executed by the assured to his vendor is the problem which we are required to solve, for we regard the general doctrine of which we have spoken as too firmly established, and too strongly grounded on principle, to be successfully challenged. In order to justly solve this problem, it is necessary to analyze the instrument, and the evidence respecting it. The instrument is a peculiar one. It does not secure the payment of money, nor does it provide for the performance of a general engagement to perform a designated contract. It provides for the performance of a specific act, namely, the delivery to the vendor of one-half of the net proceeds of the farm, and that the delivery of the net proceeds of the farm shall render the instrument "null and void." But while the instrument provides for the performance of a specific act, and that performance shall defeat its enforcement, it also provides that in case of default, "this mortgage may be foreclosed accordingly." There is, therefore, an engagement to perform a specific act, and a provision for enforcing performance by a decree of foreclosure. If the instrument has any force at all, it creates a lien upon the land it describes, for it declares in express words that a lien is created, and provides for the foreclosure of the lien. It is not possible to escape the force of the provisions respecting the conveyance of the land, and the mode of enforcing the lien created, for they clearly import that there is an enforceable incumbrance. It is true that, when the assured received his policy, and when the loss occurred, he was not in default; but although not in default, his engagement continued, and the security for its performance in the future remained unannulled. In every instance where a valid mortgage is executed, it constitutes an incumbrance,

and remains an incumbrance until the engagement for which it stands as a security is performed. It seems beyond controversy that a lien was charged upon the land in this instance, and that it continued in force during the life of William Vanlue, since no other construction can be given the instrument, without totally disregarding the language concerning the lien, and the right to a foreclosure. If there was a continuing charge upon the land, we can conceive no valid reason for holding that it did not constitute an incumbrance, within the meaning of the contract of insurance. It was none the less an incumbrance because the engagement it secures was performed as fully and promptly as it was possible for the appellee to perform it, up to the time the policy was issued to him, for the reason that the lien was a continuous one, requiring the yearly performance of an act, and terminating only upon the death of the lienholder. Reluctant as we are to deny a recovery, we can see no avenue which will lead us to a conclusion adverse to the appellant. We do not doubt that the appellee acted in good faith, believing that the mortgage to his father was not an incumbrance; but neither his belief nor that of the company can affect the question, for if the mortgage did constitute an incumbrance, it must be so adjudged, irrespective of the opinion or belief of the parties. *Watertown, etc., Co. v. Grover, etc., Co.*, 41 Mich. 131; 1 N. W. Rep'r, 961.

We have given careful consideration to the cases referred to by the appellee, but we are unable to regard them as sustaining the position that the mortgage executed by him was not an incumbrance. The case of *Mason v. Association*, 18 U. C. C. P. 19, was decided for the assured, upon the ground that the recitals of the deed providing for the support of the vendor did not create a charge upon the property. It is tacitly assumed in that case that if the deed had created a lien, the policy would be avoided. The decision in *Watertown, etc., Co. v. Grover, etc., Co.*, 41 Mich. 131; 1 N. W. Rep'r, 961, proceeds upon the ground that the mortgage which was alleged to create an incumbrance was absolutely void. The question in *Newman v. Insurance Co.*, 17 Minn. 123 (Gil. 98), was as to the validity of a tax-deed, the court adjudging that as the deed was absolutely void, no incumbrance was created. In the case of *Insurance Co. v. Spankneble*, 52 Ill. 53, the question arose on the provision of the policy declaring that, if

the assured was not the owner of the property, the policy should be void, and the decision was that the assured was the owner, notwithstanding the fact that her husband had an estate by the curtesy. Proceeding upon similar reasons, other courts have held that a contingent dower interest of a wife does not make the husband a conditional or part owner of property, within the meaning of a clause in a policy of insurance, requiring the assured to be the unconditional and sole owner. *Insurance Co. v. Kloeber*, 9 Ins. L. J. 354; *Hough v. Ins. Co.*, 29 Conn. 10. These cases, it must be plain to every one, do not apply to a case where, as here, there is an instrument in form a mortgage, securing an engagement, and providing for enforcement of the lien by foreclosure in the event of a default. If such an instrument does not create an incumbrance, it is difficult to conceive how it is possible to frame one that will do so. *Seybert v. Insurance Co.*, 103 Penn. St. 282.

The appellee argues that the appellant waived its right to insist upon a forfeiture, and there might be plausibility, if not strength, in the argument, if facts constituting a waiver had been replied to the answer pleading the incumbrance. *Insurance Co. v. Tomlinson*, 25 N. E. Rep'r, 126 (September 18, 1890); *Schreiber v. Insurance Co.*, 45 N. W. Rep'r, 708; *McMartin v. Insurance Co.*, 42 N. W. Rep'r, 934; *Insurance Co. v. Lansing*, 15 Neb. 494; 20 N. W. Rep'r, 22. But, where an answer pleads facts showing the existence of such an incumbrance as avoids the policy, it is incumbent upon the assured, if he seeks to avail himself of a waiver, to plead the facts constituting the waiver, for the general denial does not tender such an issue. A waiver arises out of new and affirmative matter, and such matter must be replied in order to avoid an answer which pleads an affirmative defense. A single paragraph of a reply cannot be good as a denial, and in confession and avoidance. Judgment reversed.*

INSURANCE LAW—INCUMBRANCES.

1. *General view of the subject.* — The question in regard to incumbrances upon insured property, as will hereafter appear, may arise in various ways. It is customary to require a disclosure from the applicant for insurance as to existing incumbrances upon the property for which insurance is desired. It is also customary to provide in policies that the insurance shall be avoided, if the property shall become incumbered during the life of the policy.

* Reported in 26 N. E. Rep'r, 119.

"The general object of the inquiry as to incumbrance," says May, "is to ascertain the amount of the interest of the insured in the property as affecting the judgment of the insurers upon the value of the risk, by taking into consideration the motive which the insured may have in the preservation of the property. Mutual insurance companies are also interested to know the amount of the incumbrance with reference to the value of any lien which they may have for the security of the payment of assessments." 1 May Ins., § 299.

2. What are and what are not incumbrances. — That a mortgage upon property is an incumbrance thereon is illustrated by numerous cases cited in this note and is too manifest to require any special citation of authorities. A mortgage is an incumbrance though it has not been recorded. Packard v. Agawam Mut. Fire Ins. Co., 3 Gray, 334; Hutchins v. Cleveland Mut. Ins. Co., 11 Ohio St. 477. A mortgage given to secure a third party as surety for the assured is an incumbrance, though no default has been incurred and no right of action may ever accrue. Lee v. Agricultural Ins. Co., 79 Iowa, 379; 44 N. W. Rep'r, 683. So is a mortgage given without consideration, for the purpose of defrauding creditors, the same being obligatory between the parties. Treadway v. Hamilton Mut. Ins. Co., 29 Conn. 63.

A mortgage which has been paid, or otherwise satisfied in full, is not an incumbrance, though it has not been discharged of record. Mutual Mill Ins. Co. v. Gordon, 20 Ill. App. 559; Baile v. St. Joseph Fire & M. Ins. Co., 73 Mo. 371; Merrill v. Agricultural Ins. Co., 73 N. Y. 452; Smith v. Insurance Co., 69 Vt. 689; Hawkes v. Dodge County Mut. Ins. Co., 11 Wis. 186. And see Warner v. Middlesex Mut. Ass. Co., 21 Conn. 444; Lockwood v. Middlesex Mut. Ass. Co., 47 Conn. 553. So a mortgage which is barred by the statute of limitations is no longer an incumbrance. Lockwood v. Middlesex Mut. Ass. Co., 47 Conn. 553. A mortgage which has not been delivered is not an incumbrance. Olmstead v. Iowa Mut. Ins. Co., 24 Iowa, 503; East Tex. Fire Ins. Co. v. Clarke, 79 Tex. 28. So a mortgage which is void for any reason. Wauertown Fire Ins. Co. v. Grover & Baker Sewing Machine Co., 41 Mich. 131. In the latter case a mortgage executed by the husband alone upon the homestead, being void by statute, was held to constitute no incumbrance within the condition of a policy as to incumbrances.

A mechanic's lien for the enforcement of which a petition had been filed was held to be an incumbrance in Redman v. Phoenix Fire Ins. Co., 51 Wis. 292. Here the plaintiff's application, which was made a warranty by the policy, was false if the mechanic's lien was counted as an incumbrance. In Green v. Homestead Fire Ins. Co., 82 N. Y. 517, a mechanic's lien was held not to be an incumbrance within the condition of a policy as to subsequent incumbrances.

A judgment which is by statute a lien on the insured property is an incumbrance thereon. Bowman v. Franklin Fire Ins. Co., 40 Md. 620; Blooming Grove Mut. Fire Ins. Co. v. McAverney, 102 Penn. St. 335; Campbell v. Hamilton Mut. Ins. Co., 51 Me. 69. The same has been held, though the judgment is a conditional one and may never be capable of enforcement, or though entered upon a power of attorney without the knowledge of the assured and in violation of an agreement with him. Seybert v. Pennsylvania Mut. Fire Ins. Co., 103 Penn. St. 232; Pennsylvania Mut. Fire Ins. Co. v. Schmidt, 119 Penn. St. 449; Hench v. Agricultural Ins. Co., 122 Penn. St. 123. The same is true

of a judgment, or of a mortgage, that it is not an incumbrance if paid, though not satisfied of record. *Lang v. Hawkeye Ins. Co.*, 74 Iowa, 673; *Somerset Ins. Co. v. McNally*, 46 Penn. St. 41. A judgment which is not a lien upon the insured property is, of course, not an incumbrance thereon. *Eddy v. Hawkeye Ins. Co.*, 70 Iowa, 472.

Where property had been sold for taxes and the purchaser had a lien for the money paid and ten per cent interest, the sale was held to be an incumbrance which avoided a policy in the property. *Wilbur v. Bowditch Mut. Fire Ins. Co.*, 10 Cush. 442.

A bond to convey in a specified time upon certain conditions was held to be no incumbrance upon the property after the time had elapsed and the conditions remained unperformed, though there had been a verbal waiver of the provision as to time. *Newhall v. Union Mut. Fire Ins. Co.*, 52 Me. 180.

A vendor's lien, an ordinary lease for five years, and a possible claim for assessments under a prior policy in a mutual company, were held not to constitute incumbrances in the following cases respectively: *Dohn v. Farmers' Joint-Stock Ins. Co.*, 5 Lans. 275; *Lockwood v. Middlesex Mut. Ass. Co.*, 47 Conn. 553; *Jackson v. Farmers' Mut. Fire Ins. Co.*, 5 Gray, 53.

The fact that goods insured are only partly paid for and the owner leaves them with an auctioneer for sale, with directions to pay the first proceeds to the vendor until his claim is satisfied, and authorizes the auctioneer to hold the goods as security for any money he may advance on account thereof, but none is advanced, creates no incumbrance upon the property. *Franklin Fire Ins. Co. v. Vaughan*, 92 U. S. 516.

As to claims for dower, see *Southern Mut. Ins. Co. v. Kloeber*, 31 Gratt. 739; *Va. Fire & M. Ins. Co. v. Kloeber*, 31 Gratt. 749; *Ohio Farmers' Ins. Co. v. Britton*, 31 Ohio St. 488.

A void lien of any sort is no incumbrance and may be attacked collaterally in a suit on a policy. *Runkle v. Citizens' Ins. Co.*, 6 Fed. Rep'r, 143.

3. *Disclosure of existing incumbrances — when required.*—The insured is, in general, not bound to make any disclosure as to incumbrances, unless inquired of concerning them, or required to do so by the policy. *Continental Ins. Co. v. Munns*, 120 Ind. 80; *Strong v. Manufacturers' Ins. Co.*, 10 Pick. 40; *Dwelling-House Ins. Co. v. Hoffman*, 125 Penn. St. 626; *West Rockingham Mut. Fire Ins. Co. v. Sheets*, 26 Gratt. 854; *Friesen v. Allemania Fire Ins. Co.*, 30 Fed. Rep'r, 352. But see *Smith v. Columbia Ins. Co.*, 17 Penn. St. 258.

In case of mutual companies, however, where the insured becomes a member of the company by taking out a policy therein, he is bound to take notice of the charter and by-laws and, if these require the disclosure of existing incumbrances, the insured is bound to make it whether inquired of or not. *Warner v. Middlesex Mut. Ass. Co.*, 21 Conn. 444; *Treadway v. Hamilton Mut. Ins. Co.*, 29 Conn. 68; *Leonard v. American Ins. Co.*, 97 Ind. 299; *Addison v. Kentucky & L. Ins. Co.*, 7 B. Mon. 470; *Packard v. Agawam Mut. Fire Ins. Co.*, 2 Gray, 834; *Van Buren v. St. Joseph County Village Fire Ins. Co.*, 28 Mich. 296; *Loehmer v. Home Mut. Ins. Co.*, 17 Mo. 247; *S. C.*, 19 Mo. 628; *Bersche v. St. Louis Mut. Fire & M. Ins. Co.*, 31 Mo. 555; *Smith v. Farmers' Mut. Fire Ins. Co.*, 19 Ohio St. 267. In nearly all these cases the charter or by-laws of the several companies required, in effect, that if the property was

incumbered, a statement of the incumbrances should appear in the written application, or in the policy, and a failure to comply with the requirement was held to avoid the policy. The insured is bound to see that his contract of insurance is brought within the provisions of the charter and by-laws. *Van Buren v. St. Joseph County Village Fire Ins. Co.*, 28 Mich. 398.

4. **Whether existing incumbrances are a breach of conditions not referring expressly to incumbrances.**—A policy provided that "if the interest of the assured in the property be any other than the entire, unconditional and sole ownership of the property for the use and benefit of the assured * * * it must be so represented to the company and so expressed in the written part of the policy, otherwise the policy shall be void." It was held that the existence of incumbrances on the property did not constitute a breach of this condition. *Manhattan Fire Ins. Co. v. Weill*, 28 Gratt. 389; *Woody v. Old Dominion Ins. Co.*, 81 Gratt. 862. In the former case the court says: "This condition does not refer to the *legal title*, but to the *interest* of the assured in the property; *that* he warranted to be no 'other than the entire, unconditional and sole ownership of the property.' This was no warranty against liens and incumbrances. His interest was the *sole ownership*. The fact that he had mortgaged the property did not make the mortgagee a joint owner with him. The fact that he may have incumbered it with a deed of trust does not make the *cestui que trust* a joint owner. A fact that there may have been liens for taxes, or liens by judgment, did not affect his ownership. He is still the sole owner, though he may have incumbered it, or liens may exist against it, and the existence of such is no breach of a condition declaring sole ownership. This is the doctrine of the courts, settled by repeated decisions. *Strong v. Manufacturers' Ins. Co.*, 10 Pick. 40; *Ætna Fire Ins. Co. v. Tyler*, 16 Wend. 385; 12 Wend. 507; *Smith v. Columbia Ins. Co.*, 17 Penn. St. 253; *Hough v. City Fire Ins. Co.*, 29 Conn. 10."

Provisions identical, or very similar, received the same construction in *Washington Fire Ins. Co. v. Kelly*, 82 Md. 421; *Clay Fire & Marine Stock Ins. Co. v. Beck*, 43 Md. 358; *Friesen v. Allemania Fire Ins. Co.*, 30 Fed. Rep'r, 352. But in *Farmers & Drovers' Ins. Co. v. Curry*, 13 Bush., 312, the existence of a vendor's lien was held to avoid a policy which provided that if the interest of the insured was other than the entire, sole and unconditional ownership it must be so expressed in the policy or it would be void. A mortgagee in possession under a deed absolute on its face, is not the entire, sole and unconditional owner. *Waller v. Northern Ass. Co.*, 10 Fed. Rep'r, 232.

5. **False representations as to existing incumbrances avoid the policy.**—It is almost universally held that false representations as to existing incumbrances upon the insured property render the insurance void. *Indiana Ins. Co. v. Brehm*, 88 Ind. 578; *Glade v. Germania Fire Ins. Co.*, 56 Iowa, 400; *Security Ins. Co. v. Brunger*, 6 Bush, 146; *Battles v. York County Mut. Ins. Co.*, 41 Me. 208; *Richardson v. Maine Ins. Co.*, 46 Me. 394; *Davenport v. New England Mut. Fire Ins. Co.*, 6 Cush. 340; *Lowell v. Middlesex Mut. Fire Ins. Co.*, 8 Cush. 127; *Hayward v. New England Mut. Fire Ins. Co.*, 10 Cush. 444; *Friesmuth v. Agawam Mut. Fire Ins. Co.*, 10 Cush. 537; *Murphy v. People's Eq. Mut. Fire Ins. Co.*, 7 Allen, 239; *Fales v. Conway Mut. Fire Ins. Co.*, 7 Allen, 46; *Towne v. Fitchburg Mut. Fire Ins. Co.*, 7 Allen, 51; *Draper v. Charter Oak Fire Ins. Co.*, 2 Allen, 569; *Jacob v. Eagle Mut. Fire Ins. Co.*, 7

Allen, 182; Aetna Ins. Co. v. Resh, 40 Mich. 241; Patten v. Merchants & Farmers' Mut. Fire Ins. Co., 88 N. H. 338; Gahagan v. Union Mut. Ins. Co., 48 N. H. 176; Smith v. Empire Ins. Co., 25 Barb. 497; Shoemaker v. Glens Falls Ins. Co., 60 Barb. 84; Cuthbertson v. North Carolina Home Ins. Co., 96 N. C. 480; Hutchins v. Cleveland Mut. Ins. Co., 11 Ohio St. 477; Byers v. Farmers' Ins. Co., 35 Ohio St. 606; Gotsman v. Pennsylvania Ins. Co., 56 Penn. St. 210; S. C., 48 Penn. St. 681; Blooming Grove Mut. Fire Ins. Co. v. Mc-Averney, 102 Penn. St. 835; Smith v. Ins. Co., 60 Vt. 682; Ryan v. Springfield Fire & Marine Ins. Co., 46 Wis. 671; Schumitsch v. American Ins. Co., 48 Wis. 26; Redmon v. Phoenix Fire Ins. Co., 51 Wis. 292; Mulville v. Adams, 19 Fed. Rep'r, 887; Geib v. International Ins. Co., 1 Dill. 448; Wilby v. Standard Ins. Co., 8 Ont. 115; Bleakley v. Niagara Dist. Ins. Co., 16 Grant Ch. 198; Meema v. Niagara Dist. Ins. Co., 22 U. C. Q. B. 214.

In most of the foregoing cases the application was made a part of the policy or the insured otherwise, expressly or in legal effect, warranted the truth of its statements. But, though the truth of representations as to incumbrances is not warranted, they are deemed material and, if false, avoid the contract. Lowell v. Middlesex Mut. Fire Ins. Co., 8 Cush. 127; Davenport v. New England Mut. Fire Ins. Co., 6 Cush. 340; Hayward v. New England Mut. Fire Ins. Co., 10 Cush. 444; Byers v. Farmers' Ins. Co., 35 Ohio St. 606; Ryan v. Springfield Fire & Marine Ins. Co., 46 Wis. 671. In *Sweat v. Piscataquis Mut. Ins. Co.*, 79 Me. 109, the materiality of the misrepresentation was held to be a question for the jury.

It is not a question of good faith on the part of the insured. If the representations are in fact false, it is immaterial that the falsehood was unintentional. *Glade v. Germania Fire Ins. Co.*, 56 Iowa, 400; *Lowell v. Middlesex Mut. Fire Ins. Co.*, 8 Cush. 127; *Towne v. Fitchburg Mut. Fire Ins. Co.*, 7 Allen, 51; *Byers v. Farmers' Ins. Co.*, 35 Ohio St. 606; *Schumitsch v. American Ins. Co.*, 48 Wis. 26; *Wilby v. Standard Ins. Co.*, 8 Ont. 115. Where the insured represented the property in question as mortgaged for \$1,200, and there was an old mortgage for \$5,000 against the property duly recorded, but made prior to the inception of his title, and of which he was in total ignorance it was nevertheless held a misrepresentation which avoided the policy. *Schumitsch v. American Ins. Co.*, 48 Wis. 26. If he does not know the amount of incumbrances he should say so. *Glade v. Germania Fire Ins. Co.*, 56 Iowa, 400.

6. What representations are deemed false — variance in amount. — When the insured undertakes to state the amount of incumbrances on the insured property he is bound to do so with accuracy, and an understatement of the amount is as fatal as though the representation was wholly false. Thus, where insured represented the incumbrance as "about \$3,000," when it was \$4,000, it was held to avoid the policy. *Hayward v. New England Mut. Fire Ins. Co.*, 10 Cush. 444. So, in the following cases, the figures first given being the amount represented and the figures following being the true amount: \$1,000—\$1,400, *Fales v. Conway Mut. Fire Ins. Co.*, 7 Allen, 46. \$800—\$1,590, *Towne v. Fitchburg Mut. Fire Ins. Co.*, 7 Allen, 51. \$3,000—\$4,551, *Ryan v. Springfield Fire Marine Ins. Co.*, 46 Wis. 671. \$2,000—\$3,440, *Byers v. Farmers' Ins. Co.*, 35 Ohio St. 606. \$3,000—\$4,425, *Glade v. Germania*

Fire Ins. Co., 56 Iowa, 400. \$1,200—\$2,068, *Schmittsch v. American Ins. Co.*, 48 Wis. 26. \$5,000—\$8,160, *Wilby v. Standard Ins. Co.*, 3 Ont. 115.

The omission to include in the amount, interest which has accrued and become payable, was held fatal in *Jacobs v. Eagle Mut. Fire Ins. Co.*, 7 Allen, 182, and *Glade v. Germania Fire Ins. Co.*, 56 Iowa, 400. In the former case the insured stated that there were two mortgages on the property amounting to \$3,700 in all. This sum was the face of the mortgages. On one of them there was \$300 accrued interest. The omission to state interest which has accrued, but not become payable, is immaterial. *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410.

7. *What representations deemed false—special cases.*—Plaintiff represented that the insured premises were mortgaged for \$1,100 to C. There was a prior mortgage for \$1,200 to B. which was well known to plaintiff. It was claimed that, by an arrangement between the parties, payments to C. were to be applied in discharge of the mortgage to B. It was held that this would not save the policy, as, if true, the payment of the amount of C.'s mortgage would not discharge the mortgage to B. within \$100. *Battles v. York County Mut. Fire Ins. Co.*, 41 Me. 208.

A., B. and C., being tenants in common of a mill and other real estate, mortgaged the entire property for \$37,000. Afterward they made a partition among themselves and the mill was deeded to A. It was verbally agreed between them that \$17,000 of the mortgage should attach to the mill and the balance to the other property. This was assented to by the mortgagees. A. took out a policy of insurance on the mill and represented it as mortgaged for \$17,000 only. It was held to be correct; that the verbal arrangement was good between the parties and that third parties could not raise the objection of the statute of frauds. *Mutual Mill Ins. Co. v. Gordon*, 20 Ill. App. 559.

Plaintiff purchased property of N. and gave back a mortgage to him for part of the purchase price. There was a prior mortgage of \$300 upon the property which N. agreed to pay, and he covenanted in his deed that the property was free and clear. Plaintiff applied for insurance and disclosed only the mortgage to N., though the prior mortgage had not been paid. It was held that as plaintiff could diminish his own mortgage by the amount of the prior mortgage, if not paid by N., his answers were substantially true and the policy was good. *Ring v. Windsor County Mut. Ins. Co.*, 54 Vt. 434.

Where the insurance is upon chattels only, it is no defense that they are contained in a building which is incumbered. *Ashford v. Victoria Mut. Ass. Co.*, 20 U. C. C. P. 434.

In *Haden v. Farmers & Mechanics' Fire Assn.*, 80 Va. 683, it is said that where the misrepresentation as to incumbrances is merely technical, immaterial and unintentional, it will not avoid the policy.

8. *Where the insured states the truth as to existing incumbrances to agent of company, who by mistake or otherwise writes false answers—parol evidence.*—It is very generally held by the courts that when the application is made out by the agent of the insurance company, and the applicant gives correct answers or information to such agent in regard to existing incumbrances upon the property, but the agent, by mistake or otherwise, and without the knowledge of the applicant, writes down false answers or statements concerning the same, the policy cannot be avoided by reason of such

false statements. *Phoenix Ins. Co. v. Copeland*, 86 Ala. 551; *Hough v. City Fire Ins. Co.*, 29 Conn. 10; *Andes Ins. Co. v. Fish*, 71 Ill. 620; *Germania Fire Ins. Co. v. McKee*, 94 Ill. 494; *Boetcher v. Hawkeye Ins. Co.*, 47 Iowa, 253; *German Ins. Co. v. Gray*, 43 Kans. 497; 2 Am. R. R. & Corp. Rep. 459; *Addison v. Kentucky & L. Ins. Co.*, 7 B. Monr. 470; *Ætna Live Stock, etc., Ins. Co. v. Olmstead*, 21 Mich. 246; *Michigan State Ins. Co. v. Lewis*, 30 Mich. 41; *Gristock v. Royal Ins. Co.*, 84 Mich. 161; 47 N. W. Rep'r, 549; *Tubbs v. Dwelling-House Ins. Co.*, 84 Mich. 646; 48 N. W. Rep'r, 296; *Holmes v. Drew*, 16 Hun, 491; *Masters v. Madison County Mut. Ins. Co.*, 11 Barb. 624; *Sprague v. Holland Purchase Ins. Co.*, 69 N. Y. 128; *Richmond v. Niagara Fire Ins. Co.*, 79 N. Y. 280; *Benninghoff v. Agricultural Ins. Co.*, 93 N. Y. 495; *Eilenberger v. Protection Mut. Fire Ins. Co.*, 89 Penn. St. 464; *Smith v. Farmers', etc., Fire Ins. Co.*, 89 Penn. St. 287; *Kister v. Lebanon Mut. Ins. Co.*, 128 Penn. St. 558. And see *Schumitsch v. American Ins. Co.*, 48 Wis. 26.

In *Ætna Live Stock, etc., Ins. Co. v. Olmstead*, 21 Mich. 246, the court says: "The general rule undoubtedly is, that in the absence of fraud, accident or mistake, a party must be conclusively presumed to understand the force of his contracts and be bound by their terms. But it cannot be tolerated that one party shall draft the contract for the other, and receive the consideration, and then repudiate his obligation on the ground that he had induced the other party to sign an untrue representation, which was by the very terms of the contract to render it void. Still less can this be allowed when the representation itself is so ambiguously worded as to be well calculated to conceal its real meaning, and to deceive the party signing it.

"It is true that in this case the paper in question was drawn by an agent; but we do not think that, in a legal point of view, the rights of the parties are any different from what they would be had the agent himself been insurer. The insurance business of the world is done through agents almost exclusively, and the maxim *qui facit per alium facit per se* applies with special force to their acts. These agents assume to have and generally do have much more intimate knowledge of the business than those with whom they deal. They must also be fairly presumed to understand the requirements of their principals, and how properly and legally to fill up the blank applications and other papers with which their principals intrust them. The community in general do not assume to be familiar with these matters, and would not venture in any case to set up their own view of what was or was not the proper form of an application, against the positive assertion of an expert. The forms and requirements of different insurers are different; and when an agent, who at the time and place is the sole representative of the principal, assumes to know what information the principal requires, and after being furnished with all the facts, drafts a paper which he declares satisfactory, induces the other party to sign it, receives and retains the premium moneys, and then delivers a contract which the other party is led to believe, and has a right to believe, gives him the indemnity for which he paid his money, we do not think the insurer can be heard in repudiation of the indemnity, on the ground of his agent's unskillfulness, carelessness or fraud. If this can be done it is easy to see that the community is at the mercy of these insurance agents, who will have little difficulty in a large proportion of the cases, in giving a worthless policy for the money they receive.

"We have never seen reason to doubt the correctness of the decision in *Peoria Marine & Fire Ins. Co. v. Hall*, 12 Mich. 203, the principle of which governs the present case. Without undertaking to say that the answer to the ninth interrogatory as above given can be declared untrue, we think if it is so, and the policy for that reason, according to its terms, made void at its delivery, the agent, who had knowledge of all the facts, was chargeable also with knowledge of this invalidity; that the insurers are also chargeable with the knowledge possessed by their agent, and that consequently it was a fraud on their part to receive the premium moneys and deliver the policy without intending that it should have effect under such circumstances. Such a fraud the law will not permit to be consummated; but on the contrary it will hold that when they delivered the policy it was with the intention that it should take effect, and that the insured should have the benefit from it for which he paid; and if there was any error or ambiguity in the application which their agent prepared, they must be held, under the circumstances here appearing, to have waived it." Pages 252-254.

The fact that the written application is attached to or made a part of the policy is immaterial. The insured is not bound to read it or to suspect fraud or mistake. *Kister v. Lebanon Mut. Ins. Co.*, 128 Penn. St. 553; *Benninghoff v. Agricultural Ins. Co.*, 93 N. Y. 495.

A contrary view is held in *Lowell v. Middlesex Mut. Fire Ins. Co.*, 8 Cush. 127; *Smith v. Empire Ins. Co.*, 25 Barb. 497; *Cuthbertson v. North Car. Home Ins. Co.*, 96 N. C. 480; *Bleakly v. Niagara District Ins. Co.*, 16 Grant Ch. 198; *Chattelton v. Canadian Mut. Fire Ins. Co.*, 27 U. C. C. P. 450. "It behooves the assured," says the court in *Lowell v. Middlesex Mut. Fire Ins. Co.*, 8 Cush. 127, "to see for himself, or get a skillful and trustworthy agent to act for him, and not to sign any paper, which is not in fact substantially true, when his important rights, indeed all the benefits of the contract, are dependent upon it."

Where the charter or by-laws of a mutual company make the insurance upon incumbered property void unless the incumbrances were set forth in the policy or application, the insured must see to it that they are complied with, and where there is a failure to comply, the mistake or knowledge of the agent will not estop the company or cause the defect. *Leonard v. American Ins. Co.*, 97 Ind. 299; *Van Buren v. St. Joseph County Village Fire Ins. Co.*, 28 Mich. 396; *Loehner v. Home Mut. Ins. Co.*, 17 Mo. 247; S. C., 19 Mo. 628; *Smith v. Farmers' Mut. Fire Ins. Co.*, 19 Ohio St. 287.

Plaintiff, when asked about incumbrances, stated that he had given a judgment note, but didn't know whether judgment had been entered upon it or not. The agent, who was writing the application, asked whether he should put down incumbrance or no incumbrance. Plaintiff replied that he should put it down as he liked. The agent then said he would put it down "no incumbrance" and did so. It was held to be the same as though the plaintiff had written the application himself, and, as judgment had been entered on the note and was a lien on the property insured, the policy was held to be void. *Blooming Grove Mut. Fire Ins. Co. v. McAverney*, 102 Penn. St. 835. See, also, *Cooper v. Farmers' Mut. Fire Ins. Co.*, 50 Penn. St. 299.

Insured owned two farms which were included in a single mortgage for \$4,800. The insurance was upon a barn upon one of the farms. The insured

stated the facts to the agent, who apportioned the incumbrance between the two farms, and put down \$2,600 as the incumbrance upon the farm with the barn upon it. It was held the company was estopped by the act and knowledge of its agent from avoiding the policy on the ground that the application was false. *Holmes v. Drew*, Rec'r, 16 Hun, 491.

The application for insurance contained the following question: "Incumbrances; if any, state the amount. Is there any insurance by the mortgagees? State the amount." The plaintiff stated that there were two mortgages on the property, and the matter was talked over, and the agent concluded that as there was no insurance by the mortgagees the existence of the incumbrances was immaterial, and wrote "no" as an answer to the question. The policy was held binding. *Aetna Live Stock, etc., Ins. Co. v. Olmstead*, 21 Mich. 246.

9. Where the company or its agents have knowledge of existing incumbrances. — Where the company or its agents have knowledge of the existence of incumbrances and issue a policy with a condition making it void by reason of such incumbrances, it will be deemed to have waived the condition. *Phoenix Ins. Co. v. Copeland*, 90 Ala. 386; 8 South. Rep'r, 48; *Home Mut. Fire Ins. Co. v. Garfield*, 60 Ill. 124; *Patten v. Merchants & Farmers' Mut. Fire Ins. Co.*, 40 N. H. 875; S. C., 88 N. H. 888; *Bidwell v. North Western Ins. Co.*, 24 N. Y. 303; *State Ins. Co. v. Todd*, 38 Penn. St. 272; *Mulville v. Adams*, 19 Fed. Rep'r, 887. And see to the same effect, *Atlantic Ins. Co. v. Wright*, 23 Ill. 463; *Commercial Ins. Co. v. Spankneble*, 53 Ill. 53; *Union Ins. Co. v. Chipp*, 93 Ill. 96; *Germania Fire Ins. Co. v. Hick*, 125 Ill. 361; *Sautell v. Oswego County Farmers' Ins. Co.*, 16 Hun, 516; *Van Schoick v. Niagara Fire Ins. Co.*, 68 N. Y. 434; *Home Ins. Co. v. Stone River Nat'l Bank*, 1 Am. R. R. & Corp. Rep. 658; *Crouse v. Hartford Fire Ins. Co.*, 1 Am. R. R. & Corp. Rep. 408. This principle has been held to apply even where the insured falsely represented that the property was not incumbered. *Patten v. Merchants & Farmers' Mut. Fire Ins. Co.*, 40 N. H. 875; S. C., 88 N. H. 888; *Mulville v. Adams*, 19 Fed. Rep'r, 887.

Where the loss is made payable to a mortgagee, this is sufficient notice of the incumbrance, and the policy cannot be avoided by reason thereof. *Insurance Co. of North America v. McDowell*, 50 Ill. 190; *Commercial Ins. Co. v. Spankneble*, 53 Ill. 53. And see *Lewis v. Council Bluffs Ins. Co.*, 68 Iowa, 198.

10. Effect of incumbrances put on the insured property between the application and issuance of policy. — An application for insurance was made on October 5, and correctly represented the property as mortgaged for \$300 only. The policy was issued on the 11th and on the same day an additional mortgage was put upon the property. There was no provision avoiding the policy for subsequent incumbrances and no fraud was shown. The policy was held good. *Dutton v. New Eng. Mut. Fire Ins. Co.*, 29 N. H. 153.

A policy was issued on December 17, 1878, which made an application dated February 2, 1878, a part of the policy, and warranted the truth of its representations. The application represented the property as unincumbered, which was true on February 2, but on July 11, following, it had been mortgaged. It was held that the language of the policy was to be taken against the insurer and should be construed to warrant that the application was true as of its date and no more. The policy was, therefore, sustained. *Schroeder v. Traders' Ins. Co.*, 109 Ill. 157.

11. *Subsequent incumbrances—when they avoid policy.*—The fact that the insured property becomes incumbered after the issuance of the policy does not affect the insurance, unless there is some provision in the policy to that effect. *Tiefenthal v. Citizens' Mut. Fire Ins. Co.*, 53 Mich. 306; *Howard Fire Ins. Co. v. Brewer*, 23 Penn. St. 50.

In general if the property becomes incumbered in violation of a condition of the policy, or of the charter or by-laws of the company, it avoids the policy. *Pfister v. Gerwig*, 2 Am. R. R. & Corp. Rep. 165; *Supple v. Iowa State Ins. Co.*, 58 Iowa, 29; *Ellis v. State Ins. Co.*, 61 Iowa, 577; *Mallory v. Farmers' Ins. Co.*, 65 Iowa, 450; *Hicks v. Farmers' Ins. Co.*, 71 Iowa, 119; *Russell v. Cedar Rapids Ins. Co.*, 71 Iowa, 69; S. C., 78 Iowa, 216; *German Am. Bank v. Agricultural Ins. Co.*, 8 Mo. App. 401; *Merrill v. Agricultural Ins. Co.*, 73 N. Y. 452; *Gould v. Holland Purchase Ins. Co.*, 16 Hun, 538; *Dacey v. Agricultural Ins. Co.*, 21 Hun, 83; *McNierney v. Agricultural Ins. Co.*, 48 Hun, 239; *Eagan v. Mut. Ins. Co.*, 5 Denio, 326; *Kensington National Bank v. Yerkes*, 86 Penn. St. 227; *Brown v. Commonwealth Mut. Ins. Co.*, 41 Penn. St. 187; *Sebert v. Pennsylvania Mut. Fire Ins. Co.*, 103 Penn. St. 282; *Pennsylvania Mut. Fire Ins. Co. v. Schmidt*, 119 Penn. St. 449; *Hench v. Agricultural Ins. Co.*, 123 Penn. St. 128; *East Texas Fire Ins. Co. v. Clarke*, 79 Tex. 23; 15 S. W. Rep'r, 166; *McGowan v. People's Mut. Fire Ins. Co.*, 54 Vt. 211; *Parker v. Agricultural Mut. Ins. Co.*, 28 U. C. C. P. 80; *O'Neill v. Ottawa Agricultural Ins. Co.*, 30 U. C. C. P. 151.

The execution of a mortgage is a breach of a condition in a policy that if the *interest* of the insured in the property shall be changed in any way, whether by sale, transfer or conveyance, the policy shall be void. *East Texas Fire Ins. Co. v. Clarke*, 79 Tex. 23; 15 S. W. Rep'r, 166; *O'Neill v. Ottawa Agricultural Ins. Co.*, 30 U. C. C. P. 151. A policy contained this provision: "If the *title* of the property is transferred, incumbered or changed, this policy shall be void." It was held that the word *title* meant the same as *property*, and that a mortgage of the property avoided the policy. *Ellis v. State Ins. Co.*, 61 Iowa, 577. But a mortgage of chattels, the mortgagor retaining possession, was held not to be a "change of title," nor a "sale, transfer or alienation" within the meaning of a policy. *Van Duesen v. Charter Oak Fire & M. Ins. Co.*, 1 Robt. (N. Y.) 55.

Where the provision was that if an incumbrance should *fall* or be executed upon the property the policy should be void, it was held that the rendition of a judgment against the insured, which became a lien on the property, was within the provision and avoided the insurance. *Kensington National Bank v. Yerkes*, 86 Penn. St. 227; *Brown v. Commonwealth Mut. Ins. Co.*, 41 Penn. St. 187.

Insurance was taken out upon a building in process of construction, and the insured stated to the agent that he owed for materials, etc., and would mortgage the property for enough to pay such indebtedness, which would be not less than \$1,000, and the agent wrote in the application that the property was mortgaged for \$1,000. Insured afterward mortgaged the property for \$1,300. It was held that, construing the policy as permitting a mortgage for \$1,000, the mortgage for \$1,300 avoided the policy. *Sautell v. Oswego County Farmers' Ins. Co.*, 16 Hun, 516.

A policy was to be void if the insured afterward mortgaged or incumbered

the property. The insurance was upon a barn and hay in stack situated upon a farm of two hundred and eighty acres, the whole of which was subject to a mortgage of \$1,600. Afterward the insured sold two hundred acres of the land and bought other adjoining land. The old mortgage was released and a new one for \$1,000 put upon the eighty acres not sold. Whether it covered any of the land purchased does not clearly appear from the report. In the first report of the case it was held that the policy was not void unless the risk was incurred, and that was a question for the jury. *Russell v. Cedar Rapids Ins. Co.*, 71 Iowa, 69. Upon a second trial it was made to appear that the new incumbrance was more in proportion upon the eighty acres upon which the barn was situated and the policy was held to be avoided. *Russell v. Cedar Rapids Ins. Co.*, 78 Iowa, 216.

It is held that a change in the items of incumbrance, without changing the aggregate amount, will not avoid the policy. *Dwelling House Ins. Co. v. Gould*, 184 Penn. St. 570; 19 Atl. Rep'r, 793; *Kister v. Lebanon Mut. Ins. Co.*, 128 Penn. St. 553.

Where the by-laws of a mutual company required notice to be given, in case the property was mortgaged, but did not make the insurance void for a failure to give notice, it was held that a subsequent mortgage without notice did not affect the insurance. *Tiefenthal v. Citizens' Mut. Fire Ins. Co.*, 58 Mich. 306.

The execution of a mortgage upon property is not an *alienation, sale* or *transfer* thereof within the meaning of a policy making it void for that reason. *Jackson v. Mass. Mut. Fire Ins. Co.*, 28 Pick. 418; *Conover v. Mutual Ins. Co.*, 1 N. Y. 290; *Byers v. Farmers' Ins. Co.*, 85 Ohio St. 606; *Edmunds v. Mutual Safety Fire Ins. Co.*, 1 Allen, 311; *Hennessey v. Manhattan Fire Ins. Co.*, 28 Hun 98. In the last case the provision was that the policy should be void "if the property be sold or transferred, or any change take place in title or possession, whether by legal process, judicial decree or voluntary transfer and conveyance." It was held that a subsequent mortgage did not come within the meaning of the clause, and did not affect the policy.

12. Commencement of foreclosure proceedings—levy of execution, etc.—If the policy provides that the commencement of foreclosure proceedings, or the levy of an execution upon the insured property, shall avoid the policy, a breach of the condition is fatal to the insurance. *Meadows v. Hawkeye Ins. Co.*, 62 Iowa, 387; *Pennsylvania Ins. Co. v. Gottsman*, 48 Penn. St. 151. But where the policy provided that if any proceedings for sale of the insured property "should be had, commenced or taken," it was held that the commencement of foreclosure proceedings was not within the provision. In such case proceedings for a sale cannot be said to be commenced until steps are taken to carry out a decree ordering a sale, such as advertising the property for sale, etc. *Michigan State Ins. Co. v. Lewis*, 80 Mich. 41.

A policy was taken out upon property while proceedings to foreclose a mortgage upon it were pending, and the loss was made payable to the mortgagee or his assigns. The foreclosure proceeded to a decree and sale of the property. The policy contained stringent provisions avoiding the policy in case of foreclosure, sale, litigation, etc. It was held that the mortgage clause would govern, and that it fairly contemplated, by the use of the word "assigns," that there might be both a foreclosure and sale of the property. *German Ins. Co. v. Churchill*, 21 Ill. App. 206.

A contrary view was held in *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410, in which the court says: "The argument of plaintiff's counsel is, that when the defendant assented to this mortgage, it necessarily assented to all the necessary incidents and consequences of the mortgage interest; that, having been notified of the interest of the mortgagees in the property, and having agreed to pay him the loss, if any, it cannot call in question the natural result and incident of such mortgage title, to-wit, the foreclosure thereof, but must be held to have agreed to it in advance. This reasoning does not carry conviction to our minds. A provision that a policy shall be void in case of foreclosure proceedings is common in insurance policies, and we must assume that experience has shown to underwriters that such proceedings increase the risk to the insurer. The defendant might have been willing, for the premium charged, to insure this barn with the mortgage upon it, and yet not willing to insure it in case of proceedings to foreclose the mortgage. It did assent to the mortgage, and agree that the loss, if any, be paid to the mortgagee, but it did not assent to continue the insurance in case the risk was increased by proceedings to foreclose the mortgage. Before commencing the foreclosure the plaintiff should have obtained the assent of the defendant. It might have examined the circumstances and granted such assent without any conditions, or it might have required an additional premium for the increased risk. It might have refused altogether, and in that case the plaintiff could have delayed his foreclosure until the end of the year, or surrender the policy and procured insurance elsewhere. Even if the provision were found to be very inconvenient and embarrassing, there is no help for it. There it is, and we cannot take it out of the policy by construction. There are two provisions: one, that liens, without the assent of the company, shall avoid the policy; and another, that foreclosure proceedings shall avoid it; and effect must be given to both. According to the construction contended for on the part of the plaintiff, the latter provision would be wholly useless or nullified in every case, because all liens avoid the policy unless assented to; and according to that construction, when assented to, foreclosure proceedings may be instituted without avoiding the policy. If such proceedings may be instituted as incident to the mortgage, then they may be carried to their conclusion by a sale and conveyance, and thus by assenting to a mortgage, a company may be held to have assented to a change of title of the insured property. Such a construction is unreasonable and unwarranted. *Pratt v. New York Cent. Ins. Co.*, 55 N. Y. 505."

13. **Effect of assignment of policy with consent of company as respects existing grounds of forfeiture by reason of incumbrances.**—A policy of insurance provided that it should be void if the insured should mortgage or otherwise incumber the property. The insured violated this condition by mortgaging the property, and afterward sold to the plaintiff, to whom the policy was assigned with the consent of the company. It was held that the assignment created a new, independent contract with the assignee and that the latter could recover thereon. *Continental Ins. Co. v. Munns*, 120 Ind. 80. The following cases support the same doctrine: *Kimball v. Monarch Ins. Co.*, 70 Iowa, 513; *Stein v. Niagara Fire Ins. Co.*, 61 How. Pr. 144; *Farmers' Ins. Co. v. Ashton*, 81 Ohio St. 477; *Cumberland Valley Mut. Protection Co. v. Mitchell*, 48 Penn. St. 874; *Lebanon Mut. Ins. Co. v. Lorch*, 109 Penn. St. 100.

A policy was issued upon property which was represented as subject to a

mortgage for \$2,000. The policy was void in the hands of the insured for failure to disclose a prior mortgage upon the property for \$800. Afterward the policy was assigned to the holders of the \$2,000 mortgage, with the consent of the company. The company was at the time ignorant of the \$800 mortgage, and the assignee in no way obligated himself for the payment of future premiums or assessments. It was held that the policy was void in the hands of the assignee. *Bowditch Mut. Fire Ins. Co. v. Winslow*, 8 Gray, 415. To the same effect is *Edie v. Hamilton Mut. Ins. Co.*, 8 Allen, 362. But where the assignee gave new notes for future assessments it was held that a new and substantive contract was created with him. *Foster v. Equitable Mut. Fire Ins. Co.*, 2 Gray, 216.

Where a policy was rendered void by subsequent incumbrances, and the insured sold to plaintiff, taking a mortgage back, and the policy was assigned to plaintiff with the consent of the company, it was held to be void in the hands of the assignee by reason of the incumbrance. *Parker v. Agricultural Mut. Ins. Co.*, 28 U. C. C. P. 80; *German Am. Bank v. Agricultural Ins. Co.*, 8 Mo. App. 401. To same effect, *McNierney v. Agricultural Ins. Co.*, 48 Hun, 289.

In Iowa it is held that an assignment of the policy with consent, creates a new and independent contract with the assignee, and that the policy is good in the hands of the assignee, though void in the hands of the assignor, by reason of misrepresentations as to existing incumbrances. *Ellis v. Council Bluffs Ins. Co.*, 64 Iowa, 507. But it is held that the contract with the assignee is upon the terms and conditions expressed in the policy, or, rather, that those terms and conditions enter into and form part of the contract. Consequently, where a policy provided that "if the title of the property is transferred, incumbered or changed, this policy shall be void," and the policy was assigned to plaintiff on December 22, with consent of the company and was subject to a mortgage executed by the assignor on December 6, of which the company was ignorant, it was held that the plaintiff could not recover on the policy. *Ellis v. State Ins. Co.*, 68 Iowa, 578; S. C., 61 Iowa, 577.

The court says: "When the plaintiff took an assignment of the policy, all its terms and conditions were imported into the new contract, and it became one of the conditions of the new contract that 'if the title to the property is * * * incumbered * * * this policy shall be void.' The plaintiff, as assignee of the policy, became a party to such condition, just as essentially as his assignors did when the policy was first issued. The condition pertained to the character of the risk as it then was or should be thereafter. The parties originally insured virtually agreed that if there was, at the time the policy was issued, or should be thereafter, an incumbrance upon the property, they should not, in case of loss, be entitled to recover. This was the construction placed upon the condition at the former hearing and it is undoubtedly correct. When the plaintiff, as assignee of the policy, became a party to the condition he virtually agreed that if there was then, or should thereafter be, an incumbrance upon the property, he should not, in case of loss, be entitled to recover. We do not say that the mere act of the parties originally insured, in casting an incumbrance upon the property, vitiated it in the hands of the assignee. He did not agree that his assignors had not incumbered the property. His agreement was that it was not *then* incumbered, and should not be during the re-

maining life of the policy. If the policy had not been assigned and the action had been brought by the parties originally insured, their mere act in casting an incumbrance upon the property would undoubtedly have constituted a good defense. But as against the assignee the defense is not based solely upon that. The gist of the defense is that the incumbrance was allowed to *remain*, and affect the risk under the new contract. If it had been removed before or at the time of the commencement of the new contract, the case would undoubtedly have been different. The assignee could not be regarded as agreeing as to what the risk had been theretofore, but as to what it was then, and should be from that time forward. The company had been paid for carrying a risk upon unincumbered property. The premium, we may presume, had been graduated accordingly. The same rate continued. From the commencement of the new contract the company was bound to carry that risk, and only that." *Ellis v. State Ins. Co.*, 68 Iowa, 578, 580, 581.

14. *Issue of policy upon application with questions unanswered or only partly so.*—The issuing of a policy upon an application in which the questions as to incumbrances are unanswered, or only partially answered, is a waiver of any, or any further, answer, and the policy cannot be avoided because further information was not given. *Nichols v. Fayette Mut. Fire Ins. Co.*, 1 Allen, 68; *O'Brien v. Ohio Ins. Co.*, 52 Mich. 181; *Bersche v. St. Louis Mut. Fire Ins. Co.*, 81 Mo. 555; *Lorillard Fire Ins. Co. v. McCulloch*, 21 Ohio St. 176; *Sinclair v. Canadian Mut. Fire Ins. Co.*, 40 U. C. Q. B. 206.

15. *Distinction between voluntary and involuntary incumbrances.*—An application was warranted to be a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value, ownership, title, incumbrances of all kinds, insurance and hazard of the property to be insured. The application as filled out contained the following: Q. "Is there a mortgage, deed of trust, lien or incumbrance of any kind on the property? Amount and in whose favor? A. \$8,000. I. May." It was held that the warranty extended only to incumbrances created by the act or consent of the insured and was not violated by the existence of tax liens upon the property for prior years. *Herford v. Hartford Fire Ins. Co.*, 127 U. S. 404.

In *Baley v. Homestead Fire Ins. Co.*, 80 N. Y. 21, a judgment was held not to be an incumbrance within the meaning of a policy, the condition of which appears in the following quotation: "We are of the opinion that the condition in the policy, that the company shall not be liable 'if without the consent of the company written on the policy, the property insured shall hereafter become incumbered in any way,' is to be construed as to referring to incumbrances by judgment or otherwise *in invitum*, created by operation of law. We think the condition has the same meaning as if it had provided that the policy should be void if the assured should in any way incumber the property without the written consent of the company. The language used implies that the consent of the company which will prevent an avoidance of the policy, is to precede the creation of the incumbrance. This condition of things has no proper application to the case of judgments which may be obtained by third persons against the assured, but only to incumbrances created by his voluntary act. The provision for consent was not intended primarily to relieve the insured from a forfeiture incurred, but to prevent the incurring of a forfeiture. It is not reasonable to suppose that the parties intended to provide for the consent of the

company in advance to the rendition of a judgment against the insured in favor of third parties. If the condition embraces incumbrances by judgment, then in case of insurance upon real property the moment a judgment is rendered, and the lien attaches to the insured property, a forfeiture occurs and the contract of insurance is at an end, unless the company consents to reinstate it, by waiving forfeiture, and this, too, although the land cannot be sold on this judgment until an execution against the personal property is returned unsatisfied. If incumbrances created by operation of law are within the condition, the imposition of a tax on the insured property would create a forfeiture of the insurance, and the result would be that each year on the tax-rolls being completed, and put into the hands of the proper officers, for the collection of the taxes imposed, the insurances of the company on real property would be *ipso facto* terminated, taxes being an incumbrance on the land taxed (*Barlow v. St. Nicholas Nat. Bank*, 68 N. Y. 399), and all land not specially exempt being liable to taxation. A construction tending to such consequences must be rejected as not within the intention of the parties, if another construction is possible. The condition ought to be construed in the same manner as conditions in leases against assignments, and it is well settled that an assignment by operation of law is not a breach of such a condition. 7 Kent, 124."

So where a policy was conditioned to be void if the property insured "shall hereafter become mortgaged or incumbered," it was held that a subsequent judgment against the insured did not avoid the policy. *Phoenix Ins. Co. v. Pickel*, 119 Ind. 155. To the same effect as the foregoing cases: *Green v. Homestead Fire Ins. Co.*, 82 N. Y. 517; *Owen v. Farmers' Joint-Stock Ins. Co.*, 57 Barb. 518; *Stein v. Niagara Fire Ins. Co.*, 61 How. Pr. 144.

16. Agents — whether to be deemed as acting for the insured or the insurer. — Without discussing this question we refer to the following authorities in which the question has arisen in connection with the subject of incumbrances, and in nearly all of which the particular agent who acted for the company in making the contract of insurance was held to be the agent of the company in the matter of filling in the application. *Union Ins. Co. v. Chipp*, 98 Ill. 96; *Home Ins. Co. v. Duke*, 84 Ind. 253; *Boetcher v. Hawkeye Ins. Co.*, 47 Iowa, 253; *Tubbs v. Dwelling-House Ins. Co.*, 84 Mich. 646; 48 N. W. Rep'r, 296; *Loehner v. Home Mut. Ins. Co.*, 17 Mo. 247; S. C., 19 Mo. 628; *Masters v. Madison County Mut. Ins. Co.*, 11 Barb. 624; *German Ins. Co. v. Gray*, 2 Am. R. R. & Corp. Rep. 459.

Where the insured applies to a general insurance broker, who does not represent any particular company, but obtains insurance in such companies as may be desired, or as he may choose to apply to, such broker will be deemed the agent of the insured, and the latter will be bound by representations made by such broker the same as if made by himself. *Draper v. Charter Oak Fire Ins. Co.*, 2 Allen, 569; *Smith v. Empire Ins. Co.*, 25 Barb. 497; *Same v. Gore District Mut. Fire Ins. Co.*, 26 U. C. C. P. 405.

In the first of these cases the court says: "But they concede that Robley was authorized to procure insurance for them upon their property, and that, acting as their agent for this purpose, he did procure the policy which is declared on in this action, and that they accepted it, and now seek to enforce it against the defendants as a valid contract. And it is an admitted fact, that in procuring the policy he did file in the office of the defendants the application

which contains the answer upon which the defendants rely as a false representation. In this policy it is distinctly stated and declared that the parties agree that the policy is made and accepted upon and in reference to the said application. The plaintiffs having accepted this as a contract, to the benefits of which they are entitled, and insisting upon their right to enforce against the defendants the performance of all the stipulations it contains, they are concluded from denying, against the express statements in the policy itself, that the application upon which it issued was their application. This is not dissimilar in principle from the obligation upon the grantee which arises upon the acceptance of a deed poll containing reservation of duties to be performed by him, upon the breach of which an action of contract may be maintained. *Goodwin v. Gilbert*, 9 Mass. 510; *Newell v. Hill*, 2 Meta. 180; *Swasey v. Little*, 7 Pick. 296; *Felch v. Taylor*, 13 Pick. 133. It makes no difference that for certain other purposes Robley was also the agent of the defendants. *Lee v. Howard Ins. Co.*, 8 Gray, 583." *Draper & Another v. Charter Oak Fire Ins. Co.*, 2 Allen, 569, 572-573.

17. Incumbrance of part of insured property — divisibility of contract.— Where the total amount of insurance for which a policy is issued is distributed in specific sums upon different items of property, the provisions as to incumbrances may be broken with respect to one or more items and not as to all. Whether the contract in such case is severable is not a question peculiar to the topic under discussion, and we simply refer to the cases in which the question has been determined with reference to this particular form of breach. The following cases hold that the contract is severable and, unless the breach is one which affects the risk as to all, the policy will be held good as to the items not involved. *Dacey v. Agricultural Ins. Co.*, 31 Hun, 83; *Merrill v. Agricultural Ins. Co.*, 73 N. Y. 452; *McGowan v. Peoples' Mut. Fire Ins. Co.*, 54 Vt. 211. If the breach as to part affects the risk as to all, as where the insurance is upon a building and its contents, in separate items, and the incumbrance is upon the building only, then the whole is void. *Smith v. Empire Ins. Co.*, 25 Barb. 497; *Schumitsch v. American Ins. Co.*, 48 Wis. 26.

The following cases hold that the contract is not severable in any case. *Friesmith v. Agawam Mut. Fire Ins. Co.*, 10 Cush. 587; *Brown v. People's Mut. Ins. Co.*, 11 Cush. 280; *Cuthbertson v. North Carolina Home Ins. Co.*, 96 N. C. 480; *Gottzman v. Pennsylvania Ins. Co.*, 56 Penn. St. 210; *S. C.*, 48 Penn. St. 631.

WOODEN v. WESTERN N. Y. & P. R. Co.

(Court of Appeals of New York, March 10, 1891.)

1. DEATH BY WRONGFUL ACT. ACTION UNDER STATUTE OF FOREIGN STATE. A New York corporation was sued by a citizen of that state for causing the death of plaintiff's husband and intestate in Pennsylvania. The Pennsylvania statute gave a right of action in such cases to the widow, and did not limit the amount of recovery. The New York statute gave the right of action to the administrator for the benefit of the widow and children. Held, that the statutes were sufficiently similar to sustain the action.

2. HOW ACTION SHOULD BE BROUGHT. Such action should be brought by the plaintiff as widow, and not as administratrix, since the right of action is given by the Pennsylvania statute.

8. AMOUNT OF RECOVERY. The amount of recovery in such action is limited by the New York statute.

A PPEAL from superior court of Buffalo, general term.

John G. Milburn for appellant. *Harlow O. Curtiss* for respondent.

FINCH, J. This appeal is from an interlocutory judgment overruling a demurrer and determining that the complaint assailed stated a good cause of action. That pleading alleged that the plaintiff was and is a resident of this state, and the defendant a corporation created and existing under our laws. The contest thus is between a resident individual and a domestic corporation. The latter owned and operated a line of railroad extending beyond our boundaries into the adjoining state of Pennsylvania, and the complaint alleged that in that state the plaintiff's husband was killed by the negligence of the defendant company. The complaint further averred that the statutes of that state gave a right of action for the injury sustained by the widow and children; that the remedy could be enforced in the name of the former as plaintiff, but for her own benefit and that of the children; and that such statute was of similar import to that existing in our own jurisdiction. Judgment was thereupon demanded for damages in the sum of \$20,000. The demurrer interposed raised two objections: First, that the statutes of the two states were not similar, but different; and, second, that the action could not be maintained here in the name of the widow, but only in that of an executor or administrator of the deceased; and the final result sought to be established was that the widow could not maintain an action in this state because that is contrary to our statute, and that the administratrix could not, because that is contrary to the Pennsylvania statute; and so there is no remedy whatever in our jurisdiction.

Certain propositions essential to the inquiry before us have been explicitly determined in *McDonald v. Mallory*, 77 N. Y. 546, and need no other citation for their support. That case held that the

liability of a person for his acts, whether wrongful or negligent, depends in general upon the law of the place in which the acts were committed; that actions for injuries to the person in another state are sustained here without proof of the *lex loci*, because they are permitted by the common law which is presumed to exist in the foreign state; that such presumption does not arise where the right of action depends upon a statute which confers it; and that in such case the action can only be maintained here by proof that the statutes of the state in which the injury occurred give the right of action, and are similar to our own. Upon the question of similarity we have also held that the two statutes need not be identical in their terms, or precisely alike, but it is enough if they are of similar import and character, founded upon the same principle, and possessing the same general attributes. *Leonard v. Navigation Co.*, 84 N. Y. 53. It is quite evident that the two statutes are of similar import. They are founded upon the same principle, are aimed at the same evil, construct the same sort or kind of action, and give it for the benefit of the same class of individuals. In both the utter failure of redress at common law where the injury ended in death was the injustice for which a remedy was enacted; and in both the new action was given for the benefit of those who had suffered an injury as the consequence of the wrong. This fundamental agreement in the main and substantial characteristics of the two statutes is not affected by the differences of detail which the demurrer points out. The first is that by the *lex loci* the proper person to bring this action, and the only person who can maintain it, is the widow; while by our law the right of action is given to the executor or administrator. But it is given to the latter not in his broad representative character, but solely as trustee, in a case like the present, for the widow and children. *Hegerich v. Keddie*, 99 N. Y. 267. It is not a right which survives to the personal representatives, but a right created anew. The real parties in interest—those whose injury is redressed, whose right is vindicated, to whom all damages go—are one and the same in both forums. If the formal parties are different, the substantial and real parties are identical, and the difference in the trustee appointed by the law to represent their right is not such a difference as to bar our tribunals from their jurisdiction, or make the two statutes dissimilar under the rule.

It is claimed, however, that, even in that event, the right of action accruing in the place of the transaction can only be enforced in our jurisdiction under our remedial forms, and so should have been brought by the plaintiff, not as widow, but as administratrix, to which office she had been appointed in this state. But it must not be forgotten that the cause of action sued upon is the cause of action given by the *lex loci*, and vindicated here and in our tribunals upon principles of comity. 84 N. Y. 53, *supra*. That cause of action is given to the widow in her own right and as trustee for the children, and we open our courts to enforce it in favor of the party who has it, and not to establish a cause of action under our statute which never in fact arose. We refer to the *lex fori*, and measure it by and compare it with the *lex loci*, I think, for two reasons—one, that the party defendant may not be subjected to different and varying responsibilities; and the other, that we may know that we are not lending our tribunals to enforce a right which we do not recognize, and which is against our own public policy; and we do not refer to our laws as creating the cause of action which we enforce. It is the cause of action created and arising in Pennsylvania which our tribunals vindicate upon principles of comity; and, therefore, must be prosecuted here in the name of the party to whom alone belongs the right of action; and that rule the courts of Pennsylvania enforce where the cause of action arises here, by permitting it to be brought by the executor or administrator, to whom by our law the right is given, although not by their own. *Usher v. Railroad Co.*, 126 Penn. St. 207; 17 Atl. Rep'r, 597.

But the second difference relied on is, that in Pennsylvania there is no restriction upon the amount of damages which may be recovered, while in our state they cannot exceed \$5,000. That restriction pertains to the remedy, rather than the right. *Dennick v. Railroad Co.*, 103 U. S. 11. It is a limitation upon the discretion of the jury in fixing the amount of damages, but not upon the right of action, or its inherent elements and character. The restriction indicates our public policy as to the extent of the remedy, and the plaintiff who chooses to avail herself of our remedial procedure must submit to our remedial limitations, and be content with a judgment beyond which our courts cannot go. They cannot exceed it in a case arising here, and no principle of comity

requires them to enlarge the remedy which the plaintiff voluntarily seeks. There may be — there very possibly is — an exception to that rule, resting upon its own peculiar reasons, in a case where the defendant is not, as here, a domestic corporation, formed under our law, and so entitled to the benefit of our remedial limitations, but is a corporation of the state within whose jurisdiction the cause of action arose, and by whose law no restriction upon the amount of damages is permitted or enacted. We do not decide that question; but the same reasoning which would expose such a corporation to the law of its own jurisdiction would serve equally to justify the right of the domestic corporation to be protected by the remedial limitations of its jurisdiction. The difference between the two statutes, therefore, does not strictly affect the rule of damages, but rather the extent of damages; and that extent, as limited or unlimited, does not enter into any definition of the right enforced, or the cause of action permitted to be prosecuted; and so the causes of action in the two forums are not thereby made dissimilar. These views lead to an affirmance of the interlocutory judgment. That judgment should be affirmed, with costs, but with leave to the defendant to withdraw the demurrer and plead anew within twenty days after service of a copy of the judgment entered upon filing the *remittitur*, and upon payment of the costs of the action from the interposition of the demurrer to that date. All concur.*

Death by wrongful act — statutory liability — interstate law. — The bringing of actions in one state to recover for the death of a person wrongfully or negligently caused in a foreign state, where the statutes of the latter state give a right of action, is considered in note to *Ash v. Baltimore & Ohio R. Co.*, 2 Am. R. R. & Corp. Rep. 845, 851.

HOWARD V. CITY OF WORCESTER.

(Supreme Judicial Court of Massachusetts, April 1, 1901.)

MUNICIPAL CORPORATIONS. PERSONAL INJURIES CAUSED IN ERECTION OF SCHOOL-HOUSE. A city is not liable for injuries sustained by reason of a horse's becoming frightened from the blasting of rock in excavating for a public school-house, since the work is purely for the benefit of the public.

* Reported in 26 N. E. Rep'r, 1050; 126 N. Y. 10.

EXCEPTIONS from superior court, Worcester county, Caleb Blodgett, judge.

Action by Edith L. Howard against the city of Worcester for injuries received by plaintiff in consequence of her horse being frightened by the blasting of rock in the excavation for a public school-house, under the direction of one Kenney. The court refused to direct a verdict for defendant, but submitted the case to the jury, who found for plaintiff. Defendant brings exceptions.

E. A. Gaskill and Blackmer & Vaughan for plaintiff. *E. P. Goulding* for defendant.

C. ALLEN, J. The city contends that, even assuming that Kenney was its servant in such a sense that ordinarily it might be responsible for his acts or negligence, it is nevertheless exempt from responsibility to the plaintiff in the present case by reason of the nature of the work which it was carrying on, namely, the construction of a school-house for public use. It was held in the familiar case of *Hill v. Boston*, 122 Mass. 344, that a city is not responsible in damages to a child attending a public school in a school-house provided by the city, under the duty imposed upon it by general laws for an injury sustained by the child by reason of the unsafe condition of a staircase in the building. In *Bigelow v. Randolph*, 14 Gray, 541, a similar doctrine was applied where a scholar received an injury from a dangerous excavation in the school-house yard. The doctrine was reiterated in *Sullivan v. Boston*, 126 Mass. 540. It has also been applied to other public grounds, like Boston Common. *Steele v. Boston*, 128 Mass. 583; *Veale v. Boston*, 135 Mass. 187; *Clark v. Waltham*, 128 Mass. 567; *Oliver v. Worcester*, 102 Mass. 489. On the same principle a city was declared to be exempt from responsibility for a personal injury received in consequence of the defective condition of a public hospital. *Benton v. Boston City Hospital*, 140 Mass. 13; 1 N. E. Rep'r, 836. In other states a similar rule of exemption has been adopted in reference to school-houses and other public buildings maintained solely for public use and service. *Wixon v. Newport*, 13 R. I. 454 (school-house); *Eastman v. Meredith*, 36 N. H. 284 (town-house); *Hamilton Co. v. Mighels*, 7 Ohio St. 109 (court-house); *Freeholders v. Strader*, 18 N. J. Law, 108, 121 (dictum of Hornblower, C. J., as to court-houses and

jails). The principle on which this exemption from responsibility rests is, that in the various instances referred to, the building was erected, or the grounds were prepared, solely for the public use, and with a sole view to the general benefit, and under the requirement or authority of general laws. In such cases, in the absence of any statute which directly or by implication gives a private remedy, no action lies in favor of a person who has received an injury in consequence of a negligent or defective performance of the public service. The cases heretofore cited relate to injuries received after the completion of the work. It makes no difference, however, if the injury is caused by negligent act done in the direct performance of the service. *Tindley v. Salem*, 137 Mass. 171; *Lincoln v. Boston*, 148 Mass. 578; 20 N. E. Rep'r, 329; *Fisher v. Boston*, 104 Mass. 87; *Hafford v. New Bedford*, 16 Gray, 297. The plaintiff seeks to establish a distinction on the ground that her injury was received outside of the limits of the public work, relying on an expression in the judgment in *Hill v. Boston*, above cited, at page 358, and on the various decisions where cities and towns have been held responsible for injuries caused by or in the course of the construction of roads and bridges, by blasting rocks, setting back water, etc.; for example, *Deane v. Randolph*, 132 Mass. 475; *Lawrence v. Fairhaven*, 5 Gray, 110; *Waldron v. Haverhill*, 143 Mass. 582; 10 N. E. Rep'r, 481. Those cases, however, rest on grounds which take them out of the general rule, and in the last resort it must probably be considered that, taking all the statutes together which relate to the construction of roads and bridges, it is to be inferred that the legislature intended to recognize the existence of a liability for the consequences of negligence in the performance of the work. In the present case, the service in which the city was engaged was purely for the benefit of the public, and we think the case falls within the general rule which exonerates it from responsibility for the consequences of its servant's negligence. The servant himself may be responsible; the city is exempt. See, also, *Neff v. Wellesley*, 148 Mass. 487; 20 N. E. Rep'r, 111; *Curran v. Boston*, 151 Mass. 505; 24 N. E. Rep'r, 781; *Bates v. Westborough*, 151 Mass. 174; 23 N. E. Rep'r, 1070. Exceptions sustained.*

* Reported in 27 N. E. Rep'r, 11; 153 Mass. 426.

Municipal corporations—liability for negligence in the exercise of duties and agencies of a public nature.—In *Curran v. Boston*, 3 Am. R. R. & Corp. Rep. 180, the defendant was held not liable for injuries to an inmate of a work-house maintained by the city, resulting from the negligence of those employed in the institution. See generally on the subject, note to the above case, and 2 Dill. Mun. Corp., §§ 963-967.

CHAMBERS V. BOROUGH OF SOUTH CHESTER.

(Supreme Court of Pennsylvania, March 9, 1891.)

1. **EMINENT DOMAIN. CHANGE OF GRADE. DAMAGES.** Where the grade of a street is raised, the abutting property-owners are not entitled to recover as damages the amount it would cost to fill their land up to the new grade, nor for loss and inconvenience in the prosecution of their business, caused by increased difficulty of access, nor for the consequences of water in their cellars, caused by increased difficulty in drainage.

2. The measure of damages in such case is the difference between the market value of the property immediately before and immediately after the change of grade.

3. **PRACTICE IN SUPREME COURT.** Under the rules of the supreme court in Pennsylvania, rejected offers of testimony must be printed in the assignments of error.

A PPEAL from court of common pleas, Delaware county. This was a proceeding under the provisions of the act of assembly approved May 24, 1878 (P. L. 129), to recover damages from the borough of South Chester by reason of the grading of Edwards street in front of the property of the petitioner. Edwards street was a thoroughfare which had been dedicated to public use by the owners of a large tract of land when they divided the same into building lots and sold them, the petitioner becoming a purchaser of the property concerning which the questions arise in this case, either from the original proprietors or their successors in title. This thoroughfare remained at the natural grade of the ground and the dwelling and appurtenances of the plaintiff had been erected on that grade a number of years before the grading complained of had been attempted. On the 29th day of August, 1888, the burgess and council of the defendant borough enacted an ordinance defining the grade, and pursuant thereto the work was done. Its effect was to fill the street in front of the plaintiff's property with an embankment of earth about eight feet

higher than the original grade; and this, as the plaintiff alleges, affected very seriously his property, in point of value, by reason of interference with drainage, increased difficulty of access, and giving an unsightly appearance to the locality. To recover damages resulting from these causes, the petition was filed, and after the award of viewers an appeal was entered, and issue framed thereon.

W. Ward for appellant. *Geo. B. Lindsay* for appellee.

GREEN, J. The learned judge of the court below so carefully, and with so much correctness and emphasis, laid down the rule by which the damages were to be assessed, that the jury could not possibly be mistaken as to their duty in disposing of the subject. Experience has constantly demonstrated the correctness of the old rule established in the case of *Navigation Co. v. Thoburn*, 7 Serg. & R. 411, to-wit: "The jury are to consider the matter just as if they were called on to value the injury at the moment when compensation could first be demanded. They are to value the injury to the property, without reference to the person of the owner, or the actual state of his business; and in doing that the only safe rule is to inquire: What would the property unaffected by the obstruction have sold for at the time the injury was committed? What would it have sold for as affected by the injury? The difference is the true measure of compensation." Attempts have often been made to introduce particular items of damage into the case, such as the cost of fencing, loss of business, expense of altering buildings, the value of minerals under the surface, the danger of fire, the price of particular pieces of land in the neighborhood, and many other distinct and independent matters, in order that the damages to be recovered might be swelled unreasonably; but we have repudiated them all. More and more closely, in recent years, we have held parties to the rule that, after all things are considered which may affect the mind of the witness, he must give his estimate of the money value of the injury by contrasting the market value of the property as it was before the injury was inflicted with its value immediately after the injury, and the jury is instructed that the difference of these values is the measure of damage. Instances of specific rulings on this subject are *Railroad Co. v. Heister*, 40 Penn. St. 53; *Railroad*

Co. v. Patterson, 107 Penn. St. 461; Railroad Co. v. Springer, (Penn.), 13 Atl. Rep'r, 76; and Railway v. McCloskey, 110 Penn. St. 436; 1 Atl. Rep'r, 555. It is not necessary to review these or any other of the decisions in detail. In the last of the cases above referred to, our Brother Clark, in delivering the opinion, presented the doctrine in comprehensive, and at the same time precise, terms, which are quite sufficient to dispose of this case. He said: "Merely speculative damages cannot be allowed. The inconvenience arising from a division of the property, or from increased difficulty of access, the burden of increased fencing, the ordinary danger from accidental fires to the fences, fields or farm buildings, not resulting from negligence, and generally all such matters as, owing to the particular location of the road, may affect the convenient use and future enjoyment of the property, are proper matters for consideration; but they are to be considered in comparison with the advantages only as they affect the market value of the land. The jury cannot include in the verdict a fund to cover the costs of fencing, or to provide an indemnity against losses by fire, or casualties to the cattle and stock upon the farm. Such assessments must necessarily be purely speculative, as the matters thus sought to be provided against are in their nature altogether ideal and fanciful." And so, here, the plaintiff sought to prove how much it would cost to fill up his lot to the level of the changed grade of the street, and asked that the cost of such filling, as well as the cost of raising the building, and erecting retaining walls to hold the earth filling, should be allowed as part of the damages to be recovered. The learned court below very properly rejected the offers of testimony on this subject, and refused the instruction asked for by the plaintiff's second point, saying that the law did not permit a recovery for any such matters. In the third point the court was asked to instruct the jury that the plaintiff might recover damages for any loss or inconvenience in the prosecution of his business caused by increased difficulty of access to his building, and for the consequences of increased water in his cellar and on his lot occasioned by difficulties in the drainage resulting from the change of grade; all of which was refused. To the second point the court answered: "You may consider these several matters as elements in the cause, but you are not to award damages for the building of

walls or the filling up of lots as special damages, or for the likelihood of injuring the building, etc. You are not to take up these separate items, and award separate damages for them, and add them together, and say that is the damage suffered. The law has given another rule for the measuring of damages, and that rule is as before stated, and which I will now repeat. The law is this: You are to consider the market value of the property before the change, and unaffected by it, and its market value with the grade, and as affected by it. If the establishing of the new grade has added more value to the property than it has depreciated from it, the verdict should be for the defendant. If it has depreciated from the property more than it has added to it, the verdict should be for the plaintiffs, and the measure of damages should be the difference between its value before and its value after." To the third point the court answered: "Loss of his business has nothing to do with the case, unless it effects an injury to his land. * * * If water is thrown upon his premises, and lies upon his property, it is his duty to conduct the water away from the cellar if he can; and whatever that would cost would be his damage, if that was his only claim. But you will allow full and ample damage for all these elements when you take the value before and after, and allow the difference. In doing that, you get rid of all these claims; and that is the way the law lays down the rule." All of this is so entirely correct, and so perfectly in accord with the decisions, that it needs no vindication at our hands. The widest latitude was allowed in permitting the witnesses to describe all the methods in which the change of grade would or might affect the value of the property, and they were at liberty to give full effect to their views as to how and to what extent the value of the property was affected by the change of grade, and they were allowed freely to say how much, in dollars and cents, the damage of the plaintiff was, but it was required to be expressed in the change of the market value of the property as it was before and after the change of grade was made. This is undoubtedly the correct rule, and it was properly administered by the court below.

The first five assignments of error are in violation of our rules of court. The rejected offers of testimony are not printed in any one of them, and we must search the appendix to discover what

they are. It is much to be regretted that we are obliged so frequently to call attention to the careless practice which prevails so extensively in this respect. We hold ourselves at liberty at all times to reject such assignments, and we frequently do so. We should have done so in this case had it been of any consequence, but the answers to points raise the same questions, and it was, therefore, unnecessary. Judgment affirmed.*

1. *Change of grade—right to damages.*—It has been almost universally held that damages to abutting property by reason of a change of grade duly authorized by the public authorities, are not a *taking* of property for public use. Lewis Em. Dom., §§ 92-109. The only exception to the general current of authority is found in the Ohio decisions on the subject. Lewis Em. Dom., § 98. See, also, *Louisville v. Rolling Mill Co.*, 3 Bush, 416.

To obviate the manifest injustice of compelling abutting owners to submit to loss for the general good, many of the states have passed statutes giving compensation in such cases. Lewis Em. Dom., §§ 207-218.

Recent constitutions which require compensation to be made for property *damaged or injured* by public works, are held to require compensation to be made for damages occasioned to abutting property by a change of grade. Lewis Em. Dom., § 223; *City Council of Montgomery v. Maddox*, 2 Am. R. R. & Corp. Rep. 426, and note; § 2 of note to *Omaha, etc., R. Co. v. Janacek*, 3 Am. R. R. & Corp. Rep. 268.

2. *Measure of damages in such cases.*—The rule laid down in the foregoing case is undoubtedly the correct one. It is the diminution in the value of the property by reason of the change. *City Council of Montgomery v. Maddox*, 2 Am. R. R. & Corp. Rep. 426; *Montgomery v. Townsend*, 80 Ala. 489; *Moore v. Atlanta*, 70 Ga. 611; *Hempstead v. Des Moines*, 52 Iowa, 808; *Meyer v. Burlington*, 52 Iowa, 560; *Thompson v. Keokuk*, 61 Iowa, 187; *Karst v. St. Paul, etc., R. Co.*, 22 Minn. 118; *S. C.*, 23 Minn. 401; *Stowell v. Milwaukee*, 81 Wis. 523; *Church v. Milwaukee*, 81 Wis. 512; *Tyson v. Milwaukee*, 50 Wis. 78. In estimating the damages it is proper to consider the expense of adjusting the property to the new grade, the cost of filling and the cost of a retaining wall if necessary. *Thompson v. Keokuk*, 61 Iowa, 187; *Plympton v. Woburn*, 11 Gray, 415; *Hartshorn v. Worcester*, 113 Mass. 111; *Buell v. Worcester*, 119 Mass. 372; *McCarthy v. St. Paul*, 22 Minn. 537; *Church v. Milwaukee*, 81 Wis. 512; *French v. Milwaukee*, 49 Wis. 584; *Tyson v. Milwaukee*, 50 Wis. 78; *Thompson v. Milwaukee, etc., R. Co.*, 27 Wis. 93, 96. But these items are elements tending to show damages and cannot be recovered for specifically. *Springfield v. Griffith*, 21 Ill. App. 98. A contrary view has been held in Wisconsin. *Sowell v. Milwaukee*, 81 Wis. 523; *French v. Milwaukee*, 49 Wis. 584.

Benefits resulting to the property by reason of the change may be considered in reduction of damages. *Chattanooga v. Geiler*, 18 Lea, 611; *Church v. Milwaukee*, 81 Wis. 512; *Shawneetown v. Mason*, 82 Ill. 337; *Geneva v. Patterson*, 21 Ill. App. 454. If the benefits equal the damages no recovery

* Reported in 21 Atl. Rep'r, 407.

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can be had, although the owner may have to incur expense in order to conveniently use his property. *Tyson v. Milwaukee*, 50 Wis. 78.

In *Cincinnati v. Whetstone*, 47 Ohio St. 196 ; 24 N. E. Rep'r, 409, it is held that the owner is entitled to interest upon the amount of damages sustained from the time when the change of grade was made.

WHITAKER V. BURGESS, ETC., OF THE BOROUGH OF PHOENIXVILLE.

(Supreme Court of Pennsylvania, April 6, 1891.)

1. EMINENT DOMAIN. OPENING STREET. BENEFITS TO ADJACENT LAND SOLD AFTER OPENING ORDERED AND BEFORE COMMENCEMENT OF PROCEEDINGS. Where, after passage of an ordinance ordaining a street, and before the street is opened, the owner of land sells all except such as is afterward taken for the street, the measure of his damages is the value of the land taken, and the advantage of the opening of the street to the land previously conveyed cannot be taken into consideration.

A PPEAL from court of common pleas, Chester county, William B. Waddell, judge.

Appeal of Joseph C. Whitaker from the report of a jury of view, assessing damages for the opening of a street. The court on trial of the cause directed the jury to take into consideration the advantages accruing from the opening of the street to other adjoining property owned by said Whitaker at the time the ordinance ordaining the street was passed, but conveyed by him before the street was opened. Judgment was entered on a verdict of \$350, and said Whitaker appeals.

W. R. Murphy for appellant. *H. H. Gilkyson* for appellees.

GREEN, J. The ordinance ordaining Fourth avenue was passed in June, 1887. The petition of the borough, to have damages assessed for opening Fourth avenue, was presented in August, 1889. In the meantime, in July, 1888, Mr. Whitaker, the plaintiff, sold to Miss Caswell two lots, measuring together on Main street ninety-three feet, and extending along Fourth avenue the whole depth of the lot. At the time, therefore, the proceedings to open were commenced, the plaintiff owned only the ground which was actually covered by the street, along the line of the street. He had no land left which abutted on the street. There is no doubt that where a person owns all the ground which the street takes he is

entitled to the full value of the land taken, and there is no question of advantages and disadvantages to be considered. The only question that is raised on the present record is, at what time is the assessment to be made? If at the time of the ordaining of the street, the case was properly tried in the court below, the judgment should be affirmed; but if at the time of the opening, or of the commencement of the proceedings to open, the case was wrongly tried, the judgment should be reversed. We did decide in *Philadelphia v. Dickson*, 38 Penn. St. 247, that the owner had a right to have his damages assessed as soon as the street was established, whether it was opened or not; but that was because the act of 1855 expressly gave that right to the owner. The act of 1856, under which the present proceedings are instituted, contains no such provision, and hence that case is no authority for this. But in *Volkmar Street*, 124 Penn. St. 320; 16 Atl. Rep'r, 867, we decided that the right of action to have damages assessed to the owner did not commence until the opening the street or the doing of some unequivocal act by the city, which indicated that the possession of the owner was about to be disturbed. And in *Easton Borough v. Rinek*, 116 Penn. St. 7; 9 Atl. Rep'r, 63, we held that no damages were sustained until the street was opened. It was thought by the court below that the plaintiff, by his sale to Miss Caswell, had already received the advantages of the ordaining, and practically of the opening, of the street, and testimony was certainly given tending to prove that fact. But does that circumstance change the rule of law as to the time at which the damages are ascertained? We think not. The rule remains the same, and, if the owner has obtained an advantage by the delay of the borough in opening the street, we see no reason why he should be deprived of the benefit of the rule on that account. It is simply an advantage which he has acquired by force of the circumstances. At the time of the proceedings to open, he did, in fact, only own the land taken for the street, and that land was not a part of any other and larger tract owned by him.

It is difficult to understand upon what principle we can go back to an anterior time when he held other land in connection with this, in order to deprive him of the value of the land now taken. If we can go back one year for that purpose, there is no reason why we cannot do so for five, ten or twenty years. Yet to do

this would seem strangely unreasonable, when we consider all the changes of title and improvements which may have taken place on the intervening land in the meantime. It is a very common occurrence in the boroughs and smaller towns of the interior of the state that streets are plotted upon duly authorized maps and formally adopted by the authorities, upon adjacent farm lands lying within the municipal limits, many years before they are opened. The damages for opening these streets cannot be assessed until the land covered by the streets is actually taken. If an owner still continues to own adjoining land, he, of course, must submit to the application of the doctrine that his damages for the part taken must be estimated with reference to the effect of the opening of the street upon the value of his entire holding. But if he has, in perfect good faith, years before the opening, sold off all of his land except that which is taken for the street, why shall he not have the value of the land taken as the measure of his damage? We see no reason why. The time of the opening is the legal time for the assessing the damage to the owner. At that time he has no land but the land taken, and he is entitled to its value. Rules of law do not shift and vary according to changing circumstances. When an owner who has no land but that which is taken, invokes the law as it is with reference to all other citizens, he cannot be told that at some more or less remote time he owned other contiguous land, and, therefore, he cannot have the protection of the law as other citizens can. There cannot be two different and conflicting rules applicable to the same state of facts. We are of opinion that the allowance for advantages, on the ground that the land taken is part of a larger tract belonging to a common owner of the whole, cannot be made against the plaintiff, because he is not such an owner at the time his land is taken. It is possible, however, that the value of the land taken by the street may be affected to some extent by the fact that the plaintiff had sold off the adjoining land to another as a corner lot adjoining Fourth avenue, and thereby gave the right of frontage on the avenue to his grantee, and deprived himself of all right to interfere in any manner with the frontage line of the lot sold. If this difference in the character of his ownership after the conveyance of the lot affected the value of the remaining ground covered by the street, the plaintiff could only recover the value of that land as affected by the

conveyance of the adjoining ground. The question whether the value of the ground was thus affected, and to what extent, should be left to the jury, with instructions that it is only the value of the land subject to the right of the grantee of the adjoining lot to have a clear front on the avenue that should be allowed as damages. The assignments of error are all sustained. Judgment reversed, and new *verdict* awarded.*

Eminent domain — assessment of damages and benefits. — The foregoing case involves the same point as is discussed in note to *Newgass v. St. Louis, etc., R. Co.*, ante, viz.: the time with reference to which the damages should be assessed.

SUN MUT. INS. CO. v. JONES.

(Supreme Court of Arkansas, April 4, 1891.)

1. **FIRE INSURANCE. IRON SAFE CLAUSE. "OPEN FOR BUSINESS."** An insurance policy required the assured to keep books, and to lock them in a fire-proof safe when the store was not actually open for business, such books to be produced in case of loss, or the policy to be void. In a suit on the policy it appeared that it was customary for the merchants to keep their stores open for business after dark, but with locked doors, so that customers could get in only by knocking. Plaintiff's clerk, who was in the store at night, writing up the books, left, intending to return in a short time, but while he was away the building was burned and the books destroyed. Held, that the store was open for business, and the temporary absence of the book-keeper without locking up the books did not render the policy void.

2. **LIMITATION OF ACTION. ONE YEAR FROM DATE OF LOSS.** Where an insurance policy provides that an action thereon must be commenced "within one year from the date of loss," and also requires that payment of loss shall be made "in sixty days after the loss shall have been ascertained and proved," the limitation begins to run from the date of proof of loss, and not the date of loss.

A PPEAL from circuit court, Pulaski county, J. W. Martin, judge.

Action on a policy of insurance for \$2,000 on a house and stock of goods which had been destroyed by fire. Defendant answered, alleging that by the terms of the policy of insurance it was stipulated as follows: "The assured under this policy hereby covenants and agrees to keep a set of books, showing a complete record of all business transacted, including all purchases and sales, both for cash

* Reported in 21 Atl. Rep'r, 604; 141 Penn. St. 327.

and credit, together with the last inventory of said business, and further covenants and agrees to keep such books and inventory securely locked in a fire-proof safe at night, and at all times when the store mentioned in the within policy is not actually open for business, or in some secure place not exposed to a fire which would destroy the house where such business is carried on; and in case of loss the assured agrees and covenants to produce such books and inventory, and in the event of the failure to produce the same this policy shall be deemed null and void, and no suit or action at law shall be maintained thereon for any such loss." That plaintiff failed to keep a set of books showing a complete record of all transactions and a last inventory, and failed to keep said books and inventory securely locked in a fire-proof safe at night, and at all times when their store was not actually open for business, or in a secure place not exposed to the fire which would destroy their business house; but he left his books out of the safe at night when no business was being carried on, so that they were destroyed by the fire which consumed the building, and were not produced in accordance with the terms of the said policy. Defendant also pleaded that by the terms of the policy it was provided that no suit should be maintained thereon unless brought within one year after the loss, and that this suit was not brought until the lapse of more than one year. There was a trial before the court sitting as a jury, and a verdict for plaintiff. Defendant filed a motion for a new trial, which was overruled, and it excepted.

U. M. & G. B. Rose and *E. W. Kimball* for appellant. *J. M. Moore* for appellee.

MANSFIELD, J. The only contention made by counsel for the appellant on the first ground of defense is that the store was not "actually open for business" at the time of the fire, and it is argued that the book-keeper, who was the last in charge of the store on the night it was burned, had left it locked and unoccupied, and it could not, therefore, have been at any later time open for business. But the facts as found by the court are that the book-keeper, who was also a salesman, was engaged in writing up the record of the day's business, a duty which the policy itself required, when, passing out of the building by a window, he went

into an adjoining store, expecting to return in a short time and complete his work. He had been absent only a few moments when the fire broke out, and there was nothing in the manner or occasion of his leaving the store to indicate that any thing was intended beyond a brief intermission in his labor. No importance is to be given to the fact that the door was locked. The evidence explains that it was the custom to keep it locked after night to prevent the intrusion of persons whose presence was not desirable. The building having sash doors, customers could see from its being lighted that the store was open for business, and on knocking at the door they were admitted. This was the usual method of keeping the store "open" at night. Nor can the lateness of the hour aid the theory of the defense; for it is shown that it was the custom of merchants in that section of the country to continue the business of the day until ten or eleven o'clock at night; and that it was necessary to enter the transactions of each day in the books before they were locked up for the night. The policy, in effect, recites the fact that the plaintiff kept a country store; and the parties are presumed to have contracted with reference to the necessities of such a business and the usages which prevail in its management. *Jones v. Insurance Co.*, 38 Fed. Rep'r, 19. It is not contended that the store had been actually closed for the day before the book-keeper left it, and we think that, if it was then open within the meaning of the policy, there is no avoiding the conclusion that it would remain so until the transactions of the day were recorded in the books, or until some act had been done indicating a purpose to close it. In the case cited above the precise question now being considered arose, and upon the same facts, the plaintiffs and the property insured in that case being the same as in this, and the court there held that the store was "actually open for business," within the meaning of the iron-safe clause, when the fire broke out. The reasoning by which that ruling is supported appears to us conclusive. We, therefore, hold that the finding of the court below, on the issue formed by the first defense, is sustained by the evidence, and that it was not error to refuse the first declaration of law requested by the defendant. *Houghton v. Insurance Co.*, 8 Metc. (Mass.) 114; *Daniels v. Insurance Co.*, 12 Cush. 416; *Turley v. Insurance Co.*, 25 Wend. 374.

2. The second defense is that the plaintiff's action was not

brought within one year after the date of the fire. It was commenced one year after proof of the loss was made, and the remaining question to be decided is whether the time within which the policy required the plaintiff to sue should be computed from the day on which the fire occurred or from that on which the loss it occasioned was proved. The eighteenth clause of the policy, fixing the period of limitation, is as follows: "All claims under this policy are barred unless prosecuted within one year from the date of loss." By another clause it was provided that payment of the loss insured against should "be made in sixty days after the loss shall have been ascertained and proved." If the term "loss," in the eighteenth clause, is to be taken to mean the destruction of the property, then it evidently does not mean what the same word implies in the provision fixing the time of payment, for in the latter the "loss" is described as something to be ascertained, to be proved and paid — words which apply more appropriately to the amount of damages which the assured has sustained by the fire than to the fire itself. The loss to be ascertained and proved is also that contemplated by the eighth, tenth and twelfth conditions or clauses of the policy. By the tenth clause the loss in goods and merchandise is to be paid for at a value "to be ascertained by experts mutually appointed." Again, in another clause, it is stipulated that the company shall be liable only for three-fourths of the loss, not exceeding the sum insured, the other one-fourth to be borne by the assured. Here, also, the term "loss" is plainly used in the sense of pecuniary damages. Now, the limitation clause declares that all claims shall be barred "unless prosecuted within one year from the date of loss. Standing alone, this provision would seem to give the full period of one year in which claims may be prosecuted. But the clause is wholly ineffectual to accomplish that object if the appellant's construction be adopted, since no cause of action accrues in any case until the expiration of sixty days, and the time of payment may be further deferred by delays which may occur beyond the control of the assured by an exercise of the right reserved to the company to have the amount of the loss sustained and adjusted by experts. It is at least a possible thing, that the whole period of limitation might thus elapse before the right to sue would accrue. In that event the assured would, without fault on his part, be cut off from any remedy

whatever. A construction of the contract which would permit such a result cannot, it is needless to say, be entertained. *Barber v. Insurance Co.*, 16 W. Va. 658. This brief comparison of the several clauses of the policy is sufficient to show that the meaning of the limitation clause is not free from doubt, and in such case a familiar rule is applicable, which requires us to construe it most strongly against the company. 2 Whart. Cont., § 670; *May Ins.*, §§ 175-179. As to the construction to be given the limitation clause of a policy where it is drafted in language similar to that presented by this instrument, the adjudicated cases are not in harmony. But the weight of the authority which they furnish is, we think, against the construction contended for by the appellant. *Levy v. Insurance Co.*, 9 Ins. L. J. 113; *Hay v. Insurance Co.*, 77 N. Y. 242; *Steen v. Insurance Co.*, 89 N. Y. 315; *Mayor v. Insurance Co.*, 39 N. Y. 45; *Ellis v. Insurance Co.*, 64 Iowa, 507; 20 N. W. Rep'r, 782; *Spare v. Insurance Co.*, 17 Fed. Rep'r, 568; *Vette v. Insurance Co.*, 30 Fed. Rep'r, 668. The text-writers, so far as we have had access to their works, also state the rule to be that the limitation will be construed to run from the time when the loss becomes payable, and not from the date of the fire. 2 Wood Ins. 1029; *May Ins.*, § 479; *Bac. Ben. Soc.*, § 443. The plaintiff's action was not barred, and the judgment is affirmed.*

Fire insurance — limitation clause. — For rulings upon the limitation clause in policies of insurance, see generally, *Murdock v. Franklin Ins. Co.*, 1 Am. R. R. & Corp. Rep. 24; *Case v. Insurance Co.*, 2 Am. R. R. & Corp. Rep. 278; *Bower v. McMurty*, 2 Am. R. R. & Corp. Rep. 893; *Allemania Fire Ins. Co. v. Peck*, 2 Am. R. R. & Corp. Rep. 438; 2 Am. R. R. & Corp. Rep. 470, note, § 2; *Thompson v. Phoenix Ins. Co.*, 3 Am. R. R. & Corp. Rep. 119; *German Ins. Co. v. Fairbank*, post.

A condition in a policy, that no suit against the insurer shall be sustained unless commenced "within twelve months" next after the loss, is not in contravention of the Code of North Carolina, section 3076, which forbids the insurer to limit the term within which suit shall be brought "to a period less than one year." *Muse v. London Ass. Co.*, 108 N. C. 240; 13 S. E. Rep'r, 94.

Where a policy of fire insurance provides that no action upon the policy "shall be sustained unless commenced within six months after the fire," an action cannot be brought on the policy after the lapse of six months and three days after the fire, even though the policy also provides that no action shall be begun until certain examinations have been made, which examinations were not made nor waived by the company until thirteen days after the fire. *Meesman v. State Ins. Co.* (Wash.), 27 Pac. Rep'r, 77.

* Reported in 15 S. W. Rep'r, 1034; 54 Ark. 376.

ARKADELPHIA COTTON-MILLS V. TRIMBLE.

(Supreme Court of Arkansas, March 14, 1891.)

1. CORPORATIONS. SUBSCRIPTION TO STOCK. WHEN PAYABLE BEFORE ALL SUBSCRIBED. The articles of association provided that the "capital stock of said corporation shall be \$50,000, of which \$14,500 has been subscribed, * * * and the residue may be issued and disposed of as the board of directors may from time to time order and direct." After the company had begun business defendant subscribed for \$500 of the stock. In an action upon the subscription, held, that the implied condition that no subscriptions were to be paid until the whole capital stock was subscribed, could not arise, and defendant was bound to pay his subscription when called upon for it by the directors.

A PPEAL from circuit court, Miller county, C. E. Mitchell, judge.

Arnold & Cook for appellant. *Scott & Jones* for appellee.

BATTLE, J. The Arkadelphia Cotton-Mills is a corporation organized and existing under the laws of this state. Some time in January, 1888, M. H. Trimble subscribed the articles of association of the corporation, and an agreement to take and pay for twenty shares of its capital stock, amounting in the aggregate to \$500. Afterward four assessments of twenty-five per cent each on all the shares taken in the capital stock were made by the board of directors. Trimble was duly notified of the assessments upon his shares, but refused to pay them, because the full amount of the capital stock, as fixed by the articles of association, had not been taken. The question is, was he subject to the assessment?

As a general rule every contract to take and pay for shares in the capital stock of a corporation is based on the implied condition that no part of it is to be performed until the corporation is authorized to begin the prosecution of its enterprise. The reason of the rule is that "until that time the company can have no use for its capital, nor can there be any assurance that it will ever be required." It is also based on another condition, and that is, that no assessments upon the shares taken shall be made until the whole amount of the capital stock has been subscribed. This condition, in the absence of a contrary agreement, arises by implication from the just and reasonable understanding of the subscriber that he is to be aided by other subscriptions, which,

with the amount subscribed by himself, will be equal to the amount fixed as the capital stock of the company. *Railroad Co. v. Gould*, 2 Gray, 278; *Hotel Co. v. Bolton*, 46 Tex. 633; 1 *Mor. Priv. Corp.*, § 137, and cases cited.

In *Railroad Co. v. Gould*, 2 Gray, 278, Chief Justice Shaw said: "It is a rule of law too well settled to be now questioned that when the capital stock and number of shares are fixed by the act of incorporation, or by any vote or by-law passed conformably to the act of incorporation, no assessment can be lawfully made on the share of any subscriber until the whole number of shares has been taken. This is no arbitrary rule. It is founded on a plain dictate of justice, and the strict principles regulating the obligation of contracts. When a man subscribes a share to a stock, to consist of one thousand shares, in order to carry on some designated enterprise, he binds himself to pay a thousandth part of the cost of such enterprise. If only five hundred are subscribed for, and he can have no assurance which he is bound to accept that the remainder will be taken, he would be held, if liable to assessment, to pay a five-hundredth part of the cost of the enterprise, besides incurring the risk of the entire failure of the enterprise itself, and the loss of the amount advanced toward it."

This rule is further explained in *Hotel Co. v. Bolton*, 46 Tex. 633, as follows: "When there is no provision to the contrary, the man who takes the first share of the stock takes it on condition that all the shares will be taken, until the amount fixed as the capital stock of the company shall be taken by persons who will be equally bound with himself to bear the expense of the enterprise, share and share alike. In principle it is the same as if one would say: 'I will be one of the five hundred persons who will bind themselves to contribute equal amounts, not exceeding \$500 each, in building a first-class hotel in Galveston.' The proposition is not accepted and contract made so as to bind the purchaser, if only two hundred and fifty persons join it."

But it is obvious that this rule does not apply where the articles of association or the circumstances which affect the interpretation of the agreement to take stock show an intention that the corporation shall be fully organized and commence business before shares amounting to the full capital stock shall be subscribed. There can be no implied agreement to a particular effect when

the express contract is to the contrary. Neither does the condition arise by implication under the general rule where the circumstances which enter into the agreement of the subscribers and their legal heirs as to the time when the stock was underwritten. Like other contracts an agreement to take shares in the capital stock of a corporation is governed by its intention, expressed or implied. So long as and to the extent parties are free to make contracts, they are bound to perform them according to the intention. *Railroad Co. v. Wellington*, 121 Mass. 79; *Railroad Co. v. Bartlett*, 12 Gray, 244; *Railroad Co. v. Buck*, 65 Me. 326; *Railroad Co. v. Pearson*, 135 Mass. 443; 1 Mor. Priv. Corp. 2d ed., § 419.

The articles of association subscribed by Trimble contain the following provision: "The amount of the capital stock of the said corporation shall be \$50,000, of which \$14,500 has been subscribed by the incorporators aforesaid, and the residue may be issued and disposed of as the board of directors may from time to time order and direct." No implication arises from this provision that the corporation was to postpone the prosecution of its enterprise until all the capital stock was subscribed. There does not appear to be any reason why subscriptions for the remainder of the stock should not, without postponement, be solicited and received, if such was the intention. The most reasonable inference to be drawn from it is that the \$14,500 was all the money the corporation needed for the commencement of business, and that the residue of the stock was to be solicited and received from time to time as the board of directors ascertained and determined that the money to be derived therefrom was needed in the business of the corporation. *Railroad Co. v. Chandler*, 13 Metc. (Mass.) 311. The fact was, it began business as soon as the \$14,500 was subscribed and paid, and after that Trimble agreed to take and pay the \$500 of the stock subscribed by him. From this it is evident that there was and could be no implied condition in his agreement that the corporation should not begin business until all the capital stock was taken. Neither was there an implied understanding that he should not be required to pay any thing until that time. The corporation was engaged in business when he subscribed. It was evident that it would need money in the prosecution of its enterprise, for if it would not, there was

no necessity for his subscription. He was not to be an honorary member, but, on the contrary, the manifest understanding was that he should pay on his shares as the board of directors should ascertain and determine that the money he agreed to pay was needed. *Nutter v. Railroad Co.*, 6 Gray, 85; 1 *Mor. Priv. Corp.* (2d ed.), § 142, and cases cited.

Trimble was liable to pay the assessments upon his shares in the capital stock. The judgment of the court below is, therefore, reversed, and this cause is remanded, with instructions to the court to enter judgment in favor of appellant against him for the \$500 and lawful interest on each assessment on his shares from the time the same was due, according to the findings of the facts by the circuit court.*

1. **Corporations — subscriptions for stock — condition that all stock must be subscribed before subscriber liable.**—Subscribers for stock of an incorporated company, whose capital is fixed at a certain sum, whose shares are limited to a certain number, and whose charter provides that payment shall be made as may be determined by the board of directors, cannot be compelled to pay until the whole capital has been subscribed for, and the board has called for payment, unless it is shown that by their acts they have waived their rights in those regards. *Exposition Ry. & Imp. Co. v. Canal St. E. Ry. Co.*, 42 La. Ann. 870; 7 So. Rep'r, 627. To the same effect, *Masonic Temple Assn. v. Channel*, 2 Am. R. R. & Corp. Rep. 723; *Manufacturing Co. v. Parker*, 14 N. H. 548; *Railroad Co. v. Veazie*, 89 Me. 571; *Sandford v. Handy*, 25 Wend. 475; *Bray v. Farwell*, 81 N. Y. 600. The condition may, of course, be waived by the subscriber, and such waiver may be by acts, as well as otherwise. *International Fair & Ex. Assn. v. Walker*, 3 Am. R. R. & Corp. Rep. 731.

2. **Subscription procured by fraud — relief in equity.**—When plaintiff was induced to subscribe to the stock of a corporation by fraud, it was held that she could maintain an action in equity to rescind the contract, and recover the price paid in order to relieve her of any further liability arising from her continued relation to the company as stockholder, and she was not, therefore, confined to her legal remedy to recover damages for the fraud practiced on her in the sale of the stock. *Besley v. National Machine Co.*, 123 N. Y. 550; 25 N. E. Rep'r, 990. Fraud held insufficient to establish a defense to a suit upon defendant's subscription. See *Guarantee, etc., Co. v. Weil*, 141 Penn. St. 511; 21 Atl. Rep'r, 665.

3. **Subscriptions to stock of railroad company conditioned upon the completion of part of the road.**—Where a subscription to stock of a railroad company is payable when the road shall be completed between certain specified points, payment can be enforced when the condition has been complied with, and it is no defense that the entire road has not been completed, or that a part of the route has been abandoned. *Leshner v. Karshner*, 47 Ohio St. 302; 24 N.

* Reported in 15 S. W. Rep'r, 776; 54 Ark. 316.
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E. Rep'r, 882; *Armstrong v. Karshner*, 47 Ohio St. 276; 24 N. E. Rep'r, 897. When notes were given for the balance due on a subscription for stock, payable upon a like condition, and the condition was not complied with for fourteen years, it was held that there could be no recovery, as the delay had been unreasonable. *Blake v. Brown*, 80 Iowa, 277; 45 N. W. Rep'r, 751.

PENNSYLVANIA CO. V. LANGENDORFF.

(Supreme Court of Ohio, May 5, 1891.)

1. RAILROAD COMPANIES. VOLUNTARY EXPOSURE TO DANGER TO SAVE HUMAN LIFE. CONTRIBUTORY NEGLIGENCE. It is not negligence *per se* for one to voluntarily risk his own safety or life in attempting to rescue another from impending danger. The question whether one so acting should be charged with contributory negligence, in an action brought by him to recover damages for injuries received in attempting the rescue, is one of mixed law and fact, and should be submitted to the jury upon the evidence, with proper instructions from the court.

2. While one who rashly and unnecessarily exposes himself to danger cannot recover damages for injuries thus brought on himself, yet, where another is in great and imminent danger, one who attempts a rescue may be warranted by surrounding circumstances in exposing his limbs or life to a very high degree of danger; and in such cases he should not be charged with the consequences of errors of judgment resulting from the excitement and confusion of the moment.

3. WHEN A RECOVERY MAY BE HAD. In such cases, if the rescuer does not rashly and unnecessarily expose himself to danger, and is injured, the injury should be attributed to the party that negligently or wrongfully exposed to danger the person who required assistance.

ERROR to circuit court, Lucas county. The defendant in error recovered a judgment against the plaintiff in error in the court of common pleas of Lucas county for damages resulting from an injury received by him while rescuing a child of ten years, who had fallen in front of an advancing freight train of the plaintiff in error. This judgment was affirmed by the circuit court, and thereupon these proceedings were brought to obtain a reversal of the judgments of both courts. Any further statement of facts necessary to understand the questions decided will be found in the opinion.

E. W. Tolerton for plaintiff in error. *Bissell & Gorrill* for defendant in error.

BRADBURY, J. (after stating the facts as above). The defendant in error, in June, 1885, while passing along one of the streets in East Toledo, stopped at a point where the track of the railway of plaintiff in error crossed the street, and engaged in conversation with a woman who had in charge two children, one an infant in arms, the other a girl about four years old. The plaintiff in error had constructed a safety-gate at this point, and during the greater part of the day kept there a watchman to close the same when trains were approaching, as a warning to travelers. The accident that caused the injury occurred about seven o'clock in the evening, or a little later, but while it was yet light. The watchman had finished his day's labor, and gone away, and the gate was raised (or open), though the street was, perhaps, as extensively used at that hour as at any other part of the day. A local freight train was past due, and approaching at a higher rate of speed than that prescribed by the ordinances of the city. The defendant in error and the nurse were engaged in conversation at a point from which the approaching train was in view for a considerable distance, though exactly how far away it could be seen is left in some doubt.

The little girl, while her nurse and defendant in error were conversing, wandered across the railroad track, and, seeing or hearing the approaching train, became excited by the sight or noise or both; and by clapping her hands and other manifestations of surprise and delight, attracted the attention of her nurse certainly, and, probably, that of the defendant in error also. The nurse excitedly called the child to her, and while crossing the railroad track in obedience to the call it tripped and fell in front of the rapidly approaching train, whereupon the defendant in error, observing its imminent peril, sprang to its rescue, caught it in his arms, and leaped onward, but was struck by the locomotive before he could pass beyond its reach, and received the injuries of which he complains. That the safety-gate was raised and the watchman absent was not disputed at the trial, so far as the record discloses; and the evidence is amply sufficient to warrant the jury in finding that the train was being run at an unlawful rate of speed, so that in both these particulars the negligence of the railroad company was established. It is contended, however, that the negligence of the railroad company should have related to the party injured, and that the jury, in passing upon the case of the defendant in

error, should not have taken into consideration the rights of the rescued child, but should have confined itself to considering the relations existing between him and the railroad company; and in this connection the plaintiff in error requested the court of common pleas to charge the jury as follows: "The plaintiff's right to recover depends entirely upon the fact that the defendant was guilty of negligence in its relations to this plaintiff. The jury, in deliberating upon your verdict, must not consider the rights of the child. This action has nothing to do with her rights. The sole questions here are, was the defendant guilty of negligence which caused the plaintiff's injuries, and was the plaintiff himself guilty of contributory negligence?" This request was properly refused. Negligence does not usually relate to any one in particular, and does not in any case so relate unless there is some special duty owing to the individual affected by the negligent act or omission. In the case under review the railroad company owed no special duty to either the rescuer or the rescued that it would not have owed to any individuals similarly situated. The obligation was to the public generally; and any person who, without fault on his part, received an injury in consequence of its failure to discharge this obligation, may recover from it compensation therefor. No other relation is necessary, where the obligation is to the public, than that the one by its negligence has caused injury to the other without the latter's fault. It is also objectionable in another particular — that of requiring the jury to ignore the rights of the child. It is true that the child in its relations to the railroad company might have a right of action for injuries received by it, and yet no right accrue to the defendant in error for those received by him in the same accident. The circumstance that the child had a right of action could not be conclusive that the defendant in error had one also, though the same blow of the locomotive injured both, for the negligence of the latter might contribute to the result in a manner to defeat his recovery, while no negligence could be imputed to the child. If it was the object of this request to impress upon the minds of the jury the proposition above stated, that the rights of action of the child and its rescuer against the railroad company were distinct, the language selected was not well chosen. The phrase: "The jury, in deliberating on your verdict, must not consider the rights of the child.

This action has nothing to do with her rights"—was well adapted to mislead the jury into the belief that the imminent danger of the child, and its right to be rescued therefrom, were to be excluded from their consideration. This view would have defeated the recovery, for the very ground upon which the defendant in error founded his claim was that the imminent peril of the child warranted the risk he assumed in undertaking its rescue.

This brings us to the consideration of the main question. Plaintiff in error contends that it was negligence *per se* for the defendant in error to throw himself in front of a moving train in his effort to rescue the child from danger. The petition of the plaintiff below discloses that he received the injury of which he complained by voluntarily passing in front of a moving train to rescue a child who had fallen in front of it; therefore, if such an act is negligence *per se*, the petition disclosed that the negligence of the plaintiff below contributed to the injury, and he was not entitled to maintain an action therefor. The same question was raised by an exception taken to the following part of the charge of the court: "It appears that the plaintiff was struck by the engine and injured while in the act of passing across the track and rescuing a little child from danger and saving its life. To hold the railroad company responsible in damages for this injury it must be shown (1) that the child was in danger of being run over and injured by the approaching engine, and that such danger was caused or created by the negligence of the railroad company; and (2) that in making the effort to rescue the child the plaintiff was not guilty of contributory negligence. These are questions of fact which it will be your duty to determine from the evidence. * * * If you find that the peril to which the child was exposed was caused by such negligence of the company, you will then inquire whether the plaintiff, in passing across the track and attempting to rescue the child, was guilty of contributory negligence. The law will not impute negligence to an effort to preserve human life, unless made under such circumstances as to constitute rashness in the judgment of prudent persons. * * * If he believed, and had good reason to believe, that he could save the life of the child without serious injury to himself, the law will not impute to him blame for making the effort."

Plaintiff in error insists that the court of common pleas, in-

stead of leaving the question, as it did, to the jury, to say whether the act of the defendant in error, under all the circumstances, and according to the rules laid down by the court, was or was not negligent, should have told them that to pass in front of a rapidly moving train, as it was admitted the defendant in error did, even to rescue from danger a child of tender years, was in law an act of negligence that defeated his right of recovery. It is said that the defendant in error voluntarily assumed the risk, that the danger attending his act was apparent; and that, however commendable his conduct may have been when viewed from the stand-point of humanity, the law will grant no relief for an injury thus brought upon himself. It is apparent that the defendant in error was under no legal obligation to rescue the child. If he had chosen to stand by and permit the approaching train to run over and kill the child, he would have violated no rule of law, civil or criminal. Therefore what he did in the matter was a voluntary act in the sense of that term that he was under no legal obligation to perform it. That, however, is not a conclusive test of the question. To entitle one to relief for the consequences of the negligence of another it is by no means necessary that the party injured should have been at the time in the discharge of any duty whatever. His rights in this respect are perfect when he is in the performance of any lawful act, and even, in some instances and in some states, when the act is in some respects not strictly lawful. The act of the defendant in error was not only lawful, but it was highly commendable; nor was he in any legal sense responsible for the emergency that called for such prompt decision and rapid execution. The negligence of the railroad company in having no watchman at this public crossing, and the unlawful rate of speed at which the train was running toward it, to which may, perhaps, be added that of the nurse in charge of the child, were the causes of its extreme danger. There was but the fraction of a minute in which to resolve and act, or action would come too late. Under these circumstances it would be unreasonable to require a deliberate judgment from one in a position to afford relief. To require one so situated to stop and weigh the danger to himself of an attempt to rescue another, and compare it with that overhanging the person to be rescued, would be in effect to deny the right of rescue al-

together if the danger was imminent. The attendant circumstances must be regarded; the alarm, the excitement, and confusion usually present on such occasions; the uncertainty as to the proper move to be made; the promptness required; and the liability to mistake as to what is best to be done suggests that much latitude of judgment should be allowed to those who are thus forced by the strongest dictates of humanity to decide and act in sudden emergencies. And the doctrine that one who, under those or similar circumstances, springs to the rescue of another, thereby encountering even great danger to himself, is guilty of negligence *per se*, is neither supported by principle nor authority.

In *Railway Co. v. Hiatt*, 17 Ind. 102, language is used by the judge in deciding the case, which, to some extent, supports the doctrine, but the decision was not placed upon that ground, and what the learned judge said in that connection may be regarded as *obiter dictum*. The doctrine is repudiated by the text-writers and all the other cases that come to our notice. In *Eckert v. Railway Co.*, 43 N. Y. 502, it was held that "the law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under circumstances constituting rashness in the judgment of prudent persons." In that case the rescuer lost his life in throwing a small child from the track of an approaching train, and a judgment in favor of his administrator for damages resulting from his death was affirmed by the court of appeals. The resemblance between that case and the one before us is very striking. This doctrine has received the sanction of the courts of last resort in Massachusetts and Missouri. *Linnehan v. Sampson*, 126 Mass. 506; *Donahoe v. Railway Co.*, 83 Mo. 560; *Beach Contrib. Neg.*, p. 45, § 15; *Whart. Neg.*, § 314; *Pierce R. R.* 329. The doctrine that one is not necessarily chargeable with contributory negligence because he adopted a course of action that imperiled his safety, or even his life, finds support in other courts. *Carroll v. Railroad Co.*, 14 Minn. 57 (Gil. 42); *Pennsylvania Co. v. Roney*, 89 Ind. 453; *Cottrill v. Railway Co.*, 47 Wis. 634; 3 N. W. Rep'r, 376. We think the court of common pleas did not err in leaving it to the jury to determine from all the circumstances surrounding the defendant in error at the time he sprang to the rescue whether the act was rash or not, and

in saying to them that, if they found it was not rash, then it did not constitute contributory negligence. It is difficult, if not impossible, to lay down in advance a rule by which to determine the extent to which one may risk his safety or his life in emergencies of this character, and not be charged with rashness; but the emergency may be such as to warrant the assumption of a high degree of risk, and one so situated may rightfully expect his acts to be construed in the light afforded by all the circumstances that impelled him to their commission, and that he would not be charged with contributing to his injury, so as to defeat a right of action, because the result showed that the risk he assumed was greater than in the excitement of the moment he had contemplated, or in some other respect his judgment had been faulty. Judgment affirmed.*

Contributory negligence — mistaken judgment in presence of sudden peril.— See *Buchanan v. West Jersey R. Co.*, 1 Am. R. R. & Corp. Rep. 686, and note.

SALENTINE V. MUTUAL BEN. LIFE INS. CO.

(Supreme Court of Wisconsin, May 5, 1891.)

1. LIFE INSURANCE. SUICIDE. ELECTION BY COMPANY. REASONABLE TIME. An insurance policy was conditioned to be void in case the assured died by his own hand, unless he was insane at the time of taking his life, in which event the insurer reserved to itself the right to pay the amount insured or only to refund the premiums paid, "according to the equities of the case." Held, that though the policy stipulates that the amount of insurance shall be paid within sixty days after due notice and satisfactory proof of the death of the assured, where he takes his own life while insane, the insurer is entitled to a sufficient time to learn all the facts controlling the equities of the case, and three months and a few days, before notifying the beneficiary of the exercise of its option, is not an unreasonable time.

A PPEAL from superior court, Milwaukee county.

Winkler, Flanders, Smith, Bottum & Vilas for appellant.
Rogers & Mann and *C. P. Smith* for respondent.

ORTON, J. This action is to recover the insurance on two life

* Reported in 28 N. E. Rep'r, 172.

insurance policies given by the appellant company to Katherine Salentine, the respondent, and wife of Peter Salentine, on his life — the first one dated the 19th day of September, 1881, and numbered 105,844; and the other one dated the 20th day of September, 1883, and numbered 115,218; the first of \$2,000, and the other of \$3,000. The first of the above policies had the following conditions: "That in case he should die by his own hand, etc., this policy shall be void, null and of no effect, except that in case he shall die by his own hand while insane the amount to be paid by the company on this policy shall be the amount of the premiums actually paid thereon, with interest." Peter Salentine, whose life was insured, died by his own hand on the 6th day of January, 1884, and notice thereof was given to the company on the 28th day of the same month. About this policy there is no contest, and the plaintiff was entitled to and obtained judgment for the premiums paid thereon and interest. The second policy had the following conditions: "If he [the insured] shall die by his own hand, this policy shall be void. If, however, it shall be shown that the insured at the time of taking his life was insane, the company will pay the sum insured, or refund the premiums actually received, with interest thereon, according to its judgment of the equities of the case. This option is distinctly reserved by the company, and is made a part of this contract." The company stipulated in the policy to pay or cause to be paid the sum insured, at their office at the city of Newark, to the said assured, sixty days after due notice and satisfactory proof of the death of the assured. The court found that the first notice given to the plaintiff of the election of the company to pay only by refunding the premiums was on the 5th day of May, 1884. The sixty days after notice and proofs of death expired on the 28th day of March, 1884. The only proofs of the death of Peter Salentine by his own hand, while insane, was a certified copy of the coroner's inquest, without any of the evidence taken therein. There was no evidence that the plaintiff ever made an election to take the insurance instead of the premiums and interest thereon, until after the notice of the company that it elected to pay only by refunding the premiums had been received by her. The court held that the plaintiff was entitled to recover the insurance, on the ground that the company failed to give the plaintiff notice of its election to

pay only the premiums within the sixty days after receiving the notice and proofs of death. On this appeal this is the only question, the learned counsel of the appellant contending that the company made its election in proper time to limit the plaintiff to a recovery only of the premiums and interest thereon.

The language of this condition is peculiar. The election to "pay the sum insured or refund the premiums" is to be made by the company "according to its judgment of the equities of the case." The learned judge of the superior court seems to have limited the equities of the case to the amount of the premiums paid. But there may be equities in such a case, arising from the circumstances of the death of the person whose life is insured — such as his situation in life, and the causes of his unfortunate mental condition — which might naturally appeal to sympathy and humane feeling, and arising also from the circumstances in which the wife and family had been left by this terrible calamity. To give to the beneficiary of this insurance what in pure justice and fairness she ought to have under the circumstances is a correct definition of equity. It depends upon the consideration of all the circumstances of the case. I speak of this because it is claimed that all the company needed to be informed of to form a judgment of the equities of the case was the death of the insured by his own hand while insane, and the amount of the premiums paid, and that, therefore, but a short time was necessary for the company to make and give notice of such election. The learned superior court held that the time in which notice of the election should be given was the sixty days after the notice and proofs of death. The sixty days mentioned in the policy has not the remotest reference to the time in which such an election should be made. If such notice ought to be governed by any rule, it should be reasonable under the circumstances. "In the absence of any statutory or contract provision, the time in which the right of election must be exercised is not limited, except there must not be such unreasonable delay as to injure rights acquired by others." *McCracken v. Finley*, Sneed Dec. (Ky.) 195; *Cooper v. Cooper*, 77 Va. 198; *Tibbits v. Tibbits*, 19 Ves. 663.

The election provided for in this policy is different from any that is considered in the cases cited in the brief of the learned

counsel of the respondent, or any that is usually found in reported cases, in one respect, and that is, that the person to be notified of the election cannot be injured by delay if notice of the election is given at any time before suit, nor, indeed, if given after that, in time for judgment, except, perhaps, in disappointing an expectation. The plaintiff could acquire no rights which might be injured by the delay. In most of the cases the parties are reversed, and the obligee and not the obligor, and the promisee and not the promisor, is to make the election which affects the rights of the other party. It would seem that the other party ought to be in such condition that his rights would be injured by the delay to complain of it.

The plaintiff, by the policy itself, was entitled to nothing, as the policy was void. By the condition, however, she is entitled to the insurance or the premiums and interest thereon, one or the other, at the option or choice of the company. She cannot know which she is to receive until such election by the company is made, and that is all the possible consequence of the delay. So essential is it that the other party must have rights to be affected by the election that it has been often held "that an election may be revoked where the rights of others are not affected by it." *Evans' Appeal*, 51 Conn. 435; *Dabney v. Bailey*, 42 Ga. 521; *Still v. Still*, 31 Kans. 248; 1 Pac. Rep'r, 556; *Adsit v. Adsit*, 2 Johns. Ch. 448; *Elbert v. O'Neil*, 102 Penn. St. 302; *Dillon v. Parker*, 1 Swanst. 359. But notwithstanding this election differs from those most common, by the absence of any rights to be injured by the delay to make it, yet it is in the form of one kind of election mentioned in the books; and we cannot say that it ought not to be made, and notice thereof given within a reasonable time. "Election presupposes a plurality of gifts or rights, with an intention, express or implied, of the party who has the right to control one or both, that one should be a substitute for the other." 1 Swanst. 394, and note; 3 Wood. Lec. 491. This is more like a case of plurality of gifts than of rights, so far as any consequences of delay are concerned. "An election by the obligor or promisor is not common, and it is usually and oftenest used as a legal term, as the choice of one of two things, to each one of which the party choosing has equal right, but both of which he cannot have." 2 Bouv. Law Dict. 520, "Election," in nota.

In such a case the rights of the other party would be likely to suffer by delay. The party to receive would usually suffer only the displeasure of long waiting, or of disappointment up to the time it becomes necessary to demand that the election be made, or to bring suit to enforce it. In the view taken above of the full import of what is meant by the "equities of the case," the company had the right to postpone its election until it could obtain information of all the facts and circumstances above mentioned necessary to a sound judgment of the election it ought to make. "An election will not be compelled, until the party has had time and opportunity to become fully informed of the facts affecting its choice." *Macknet v. Macknet*, 29 N. J. Eq. 54; *Kreiser's Appeal*, 69 Penn. St. 194; *Hall v. Hall*, 2 McCord Eq. 269; *U. S. v. Duncan*, 4 McLean, 99; 6 Amer. & Eng. Enc. Law, 254; *Dabney v. Bailey*, *supra*; *Reaves v. Garrett*, 34 Ala. 558. Can the court say that a few days over three months was an unreasonable time for the company to become fully informed of all the facts bearing on the question of what would be most equitable for the company to do in making the election? It seems to me not. The plaintiff had not suffered any thing in her rights, and had not been pecuniarily injured in the least, and had not changed her condition in any respect by reason of the delay. It may be that the following principle would obtain and be applicable to such an election: "On the failure of a person, who has the right, to make an election in proper time, the right of election passes over to the opposite party." *Co. Litt.* 145a; *Bac. Abr. and Vin. Abr.*, tit. "Election;" *Hopk. Ch.* 337. The plaintiff did not take advantage of this principle, and elect to have the insurance, before she received notice of the election made by the company; nor did she predicate this action for the insurance on the ground of the unreasonable delay of the company to make the election. She has never complained of the delay, either by notice or pleading, or until on the trial of the action. The judgment for the plaintiff for the full insurance on the sole ground of this short delay, which had not injured the plaintiff in the least, was quite too strict a construction of this kind of an election. There does not appear to have been any ground for holding that the delay was unreasonable. The judgment of the superior court is reversed, and the cause is remanded, with direction to render judgment for the

plaintiff for only the amount of the premiums paid upon both policies and interest thereon.*

Cole, C. J., took no part.

Life insurance — forfeiture — provision in policy for reinstatement at option of company.— In *Dennis v. Mass. Benefit Assn.*, 8 Am. R. R. & Corp. Rep. 145, a policy provided that, in case of forfeiture for non-payment of assessments, the member might be reinstated for “valid reasons” to the officers of the company. It was held that what were “valid reasons” could not be determined by the officers in their absolute discretion, and that a member was entitled to a judgment of court upon the sufficiency of his reasons.

MERRILL V. TOWN OF MONTICELLO.

(Supreme Court of the United States, March 2, 1891.)

1. **MUNICIPAL CORPORATIONS. POWER TO ISSUE AND SELL NEGOTIABLE PAPER.** Though a municipal corporation may have power, either express or implied, to issue evidences of debt for money borrowed or debts existing, it cannot without express legislative authority issue and sell in the open market negotiable bonds for the purpose of raising money with which to fund its indebtedness.

2. **Negotiable paper so issued without express authority is not rendered valid because issued to take up previous paper lawfully issued.**

3. **ESTOPPEL TO DENY VALIDITY OF BONDS.** In an action at law on such paper, the corporation is not estopped to set up its invalidity because it has received and used the money for which it was issued.

IN ERROR to the circuit court of the United States for the district of Indiana.

This was an action at law by Abner L. Merrill, a citizen of Massachusetts, against the town of Monticello, in the state of Indiana, upon certain bonds and coupons issued by the town, and purchased by the plaintiff in open market. The bonds and coupons were in form like the following:

“United States of America.
 “No. 1. State of Indiana. \$100.
 “Funding Bond of the Town of
 Monticello.

* Reported in 48 N. W. Rep'r, 855; 79 Wis. 580.

"Ten years after date the town of Monticello, in the county of White, state of Indiana, promises to pay to the bearer, at the Importers and Traders' National Bank, New York, \$100 in gold, with interest thereon at the rate of seven per cent per annum, payable annually, in gold, at the same place, upon presentation of the proper coupon hereto attached, without any relief whatever from the valuation or appraisement laws of the state of Indiana. The principal of this bond shall be due and payable at the option of the holder, on the non-payment, after due presentation, of any of said coupons, for ninety days after the maturity thereof. This bond is one of a series of \$21,000, authorized by the said town by an ordinance passed by the board of trustees thereof on the 13th day of May, 1878, for the purpose of funding the indebtedness of the said town. In witness whereof, the board of trustees of the town of Monticello have caused this bond and the coupons thereof to be signed by their president and clerk, and the seal of the town to be affixed hereto, at the said town of Monticello, this 20th day of May, 1878. R. W. CHRISTY, President. Attest: F. BOSINGER, Clerk."

[Copy of coupon:] "The town of Monticello, Indiana, will pay the bearer, in gold coin, \$7, without relief from valuation or appraisement laws of the state of Indiana, at the Importers and Traders' National Bank, New York, on the 20th day of May, 1880, being one year's interest on bond No. 1. R. W. CHRISTY, President. Attest: F. BOSINGER, Clerk."

The coupons numbered two, attached to each bond, having been presented for payment, when due, at the place specified therein, and payment having been refused, the plaintiff, as the holder of one hundred and forty-three of the bonds with coupons attached, elected to declare the principal sum due, in accordance with the terms of the bonds, and accordingly, on the 1st of July, 1881, brought this action to recover that amount. A demurrer to the defendant's answer having been sustained, it filed an amended answer, in substance as follows: At the time the bonds in suit were issued, the defendant was, and still is, a municipal corporation or town, duly organized under the laws of Indiana, in pursuance of a statute of that state passed June 11, 1852. On the 24th of June, 1869, a petition was presented to the board of trustees of the town by the school trustees praying for the issue of

the bonds of the town to aid in building a school-house; and on the same day the trustees of the town passed an ordinance directing that there be issued to the school trustees \$20,000 worth of coupon bonds, of the denomination of \$100 each, bearing ten per cent interest, payable annually, which bonds, running ten years, were issued by the town May 1, 1869, and were afterward sold in open market. The principal of them had not been paid, and they constituted the only indebtedness of the town, when, on the 11th of May, 1878, the following petition, signed by the owners of taxable property in the town, was presented to the town trustees: "We, the undersigned, citizens of the town of Monticello, Indiana, and owners of the taxable property therein, respectfully petition that you, as trustees of said town, contract a loan for said town, for the purpose of paying the indebtedness thereof, in the sum of \$21,000." On the same day the board of town trustees passed and entered of record the following ordinance: "Be it ordained by the board of trustees of the town of Monticello, Indiana, that said town issue bonds in the sum of \$21,000, in denominations of \$100, bearing interest at the rate of seven per centum per annum, payable in gold, to provide the means with which to pay the indebtedness of said town. And be it further ordained, that when said bonds are issued, they be placed in the hands of J. C. Wilson, a member of the board of trustees, for negotiation and sale. And be it further ordained, that said bonds shall not be sold at a price less than ninety-four cents on the dollar." In pursuance of this ordinance, on the 20th of May, 1878, there were issued coupon bonds of the town to the amount of \$21,000, bearing seven per cent interest, payable annually, and due in ten years, being the same bonds, a large amount of which are involved in this action. After the bonds were issued, they were delivered to said J. C. Wilson, who sold them, and converted the proceeds thereof to his own use, the town not receiving any benefit therefrom. The answer further alleged that on the 20th of May, 1878, when these bonds were issued, there was no law of the state of Indiana which authorized the trustees of an incorporated town in that state to issue its bonds for the purpose of funding its indebtedness, or to issue its bonds for negotiation and sale for the purpose of paying its indebtedness, or of raising money to pay its indebtedness;

and that at the date last above mentioned the defendant was an incorporated town, organized under the general law of the state for the incorporation of towns having a population of one thousand two hundred inhabitants.

A general demurrer to the amended answer, as not stating facts sufficient to constitute a good defense to the complaint, was overruled by Judge Gresham in December, 1882 (14 Fed. Rep'r. 628); and the plaintiff then filed a reply, that part of it material to this consideration being, in substance, as follows: After admitting the main facts stated in the answer respecting the issue and sale of the bonds of 1869, and also as to the issue of the bonds of 1873, here in suit, it was alleged that the bonds in suit were legal, having been authorized by an act of the state legislature passed March 3, 1873; that the town was without means to pay its indebtedness except by the issue of its bonds, the tax levies permitted by law being insufficient for that purpose; that J. C. Wilson, as the agent of the town, under and by virtue of the authority conferred upon him by the aforesaid ordinance, negotiated the bonds in open market, and received from their sale the sum of \$19,680.17, a part of which sum, to-wit, \$6,618.10, he deposited in a bank in that town, and absconded with the remainder; that the town, by suit instituted for that purpose, recovered the aforesaid amount which had been deposited in the bank, and appropriated it to its own use; and that the plaintiff, in July, 1878, purchased one hundred and forty-three of the bonds (those in suit) in open market in Boston, at par, for cash, without any notice or knowledge on his part that Wilson had not accounted to the town for the money received by him from the sale of the bonds. A demurrer to the reply was overruled by Judge Woods, holding the circuit court. 22 Fed. Rep'r, 589. The case was then tried before Judges Gresham and Woods upon the merits, under a written stipulation waiving a jury; judgment being given in favor of the defendant.

Plaintiff afterward made a motion for a new trial, which was overruled by Judge Woods at the November term of the court, 1886. At the same time plaintiff again made a motion for a new trial, setting up, in substance, the following: That he had prepared a bill of exceptions setting forth all the evidence in the case, all of which, it was alleged, tended to support the declaration and

the reply; that ne was desirous of bringing the case to this court by writ of error, but, under the rules and practice here and the statutes of the United States, he would not be able to present the questions involved to this court without a special finding of facts upon the evidence adduced at the trial; that a manifest hardship and injustice had been done him in the case, which occurred in the manner following: The judge who heard the case on demurrer to the answer held the answer sufficient, while another judge of the court, who heard the case on demurrer to the reply, pronounced the reply sufficient, and at the final hearing plaintiff, relying upon the evidence which supported and proved his reply, did not require or ask a special finding of facts, supposing, of course, that, his reply having been proved, there would be a certificate of division in opinion between the judges who tried the cause, or that, if not so, he would have saved to him by the record the questions of law in some other proper manner; that the entry of the judgment took him wholly by surprise, and he had not saved the legal questions as he should have done by requesting beforehand a special finding of facts, because, having had his replication sustained, he had no doubt of the final judgment of the court being favorable to him; and that he was fearful that he would be remediless to present to this court the questions involved in the case, unless the judgment should be set aside and a special finding of facts made by the court. This motion was sustained by Judge Woods, over the objection of the defendant, and a new trial was granted. The case was again tried by Judge Woods without a jury, who, at plaintiff's request, made and filed the following finding of facts, and entered judgment thereon in favor of the defendant. "(1) At the time hereinafter mentioned the defendant was a municipal corporation organized and existing under and by virtue of the laws of the state of Indiana, and situate in the county of White, in the said state. (2) That upon the 24th day of January, 1869, a petition was presented to the board of trustees of said town by the school trustees thereof praying for the issue of the bonds of said town to aid in the building of a school-house in said town, which said petition was granted, and in pursuance thereof the trustees of said town did pass and adopt an ordinance directing that there should be made and issued to the said school trustees of said town \$20,000 of coupon bonds of said

town, of the denomination of \$100 each, with interest at the rate of ten per cent per annum, payable annually; and afterward, to-wit, on the 1st day of May, 1869, the said town executed the said bonds under said ordinance to the amount of \$30,000, maturing in ten years after the date thereof, which bonds were sold and delivered to certain persons, who then and there became the purchasers thereof, and which bonds at the times hereinafter mentioned were outstanding, unpaid, and valid obligations of the said town. (3) On the 11th day of May, 1878, a petition was presented to the board of trustees of the defendant, signed by citizens, owners of taxable property in said town, praying for the issue of bonds of said town to the amount of \$31,000; which petition (omitting the names of the signers thereto) is in the words following, to-wit. [Then follows the petition as set out in the answer, and heretofore quoted]. (4) That upon the 20th day of May, 1878, in pursuance of the said petition and ordinance, the said defendant town made and executed its two hundred and ten coupon bonds payable to bearer, of the denomination of \$100 each, bearing interest at the rate of seven per centum per annum; which bonds and coupons are in the words and figures following, to-wit. [Then follows a copy of a bond and a coupon heretofore set out in full].

"(5) That the said bonds were put in the hands of the said J. C. Wilson, in pursuance of said ordinance, for sale, and that \$14,300 of the said bonds, being the same as those now in suit, were sold to Claypool & Stoddard, of Indianapolis, Indiana, for which the said firm of Claypool & Stoddard paid to the said Wilson the sum of \$12,918.40, which said last-named sum was paid to said Wilson in the following manner: On and about April 14, 1879, said Claypool and Stoddard, by the direction of said Wilson, paid a draft drawn by G. A. Ivers, of Chicago, for \$6,000; on the same day said Claypool and Stoddard paid said Wilson, by their check on the First National Bank of Indianapolis, the further sum of \$5,000; that on the 13th day of May, 1879, the said Claypool and Stoddard paid to said Wilson, by their check on the First National Bank of Indianapolis, the further sum of \$1,840.30; and within a few days after the last-named date said Claypool and Stoddard, for the balance of the said sum of \$12,918.40, paid to him the sum of \$78.17. (6) That the board of trustees of said town re-

quired and exacted from their said agent, J. C. Wilson, a bond, with sureties, to secure the money which he might realize, from the sale of said bonds. (7) That the said Wilson, after the sale of said bonds, failed to turn over the proceeds thereof to the treasurer of the said town, and fled the country. (8) That at the time the said Wilson fled the country he had a large sum of money on deposit in the First National Bank of Monticello, Indiana, to his credit as 'trustee;' that suit was instituted by the defendant town against said bank to recover the same, upon the ground that such money was the proceeds of the sale of said bonds so made by the said Wilson; that judgment was rendered in favor of said town, and against said bank, for the sum of \$6,988.43; that thereupon the receiver of said bank appealed to the supreme court of Indiana, and thereupon said judgment was affirmed by said supreme court (Bundy v. Town of Monticello, 84 Ind. 119), and said town recovered the sum of \$6,988.43. (9) That the said town instituted a proceeding upon the bond so given by the said Wilson to the said town to secure the money which he might realize from the sale of said bonds, and in a court of competent jurisdiction recovered judgment against the sureties and the said Wilson on the said bond for the full amount of the proceeds arising from the sale of said bonds, and from which judgment an appeal was taken to the supreme court of Indiana, and reported in 85 Indiana at page 10, and which said judgment was reversed and remanded by said supreme court for another trial, and afterward the said suit was dismissed by the said town, and that the said town has received nothing on account of said bond. (10) That at the time of the issuing of the bonds in suit there was in the town treasury \$3,047.85, and no more, received under the taxing act of the legislature of Indiana, under which the bonds were issued, as a special fund for the payment of the \$20,000 ten per cent bonds then outstanding, and that under the laws of the state of Indiana a sum sufficient to pay said bonds could not have been raised before maturity of the same on the amount of taxable property in said town. (11) That the plaintiff is a resident of Newton, in the state of Massachusetts, and that he bought the bonds in suit in open market, in the city of Boston, as an investment, and paid therefor a valuable consideration, without any notice of any irregularity as to their issue, or any claim to that effect.

And the court further finds that the principal of the bonds sold on is actually interest, and that the interest paid the same amount is actually interest from the 31st day of May, 1881. And the court further finds, as a conclusion of law upon the foregoing facts, for the defendant.

A. C. Harris for plaintiff in error. *David Turpie and Wm. E. Cline* for defendant in error.

Mr. Justice LUMAS, after stating the facts as above, delivered the opinion of the court.

The *correlative question* presented by the record in this case is, *do the towns of Monticello have authority, under the laws of Indiana, to issue for sale in open market negotiable securities in the form of the bonds and coupons on which recovery is here sought?* Chief-Justice Kent, in his *Commentaries* (vol. 2, pp. 294, 299), referring to the strictness with which corporate powers are construed, irrespective of the distinction between public and private corporations, uses the following language: "The modern doctrine is to consider corporations as having such powers as are specifically granted by the act of incorporation, or as are necessary for the purpose of carrying into effect the powers expressly granted, and as not having any other. The supreme court of the United States declared this obvious doctrine, and it has been repeated in the decisions of the state courts. * * * As corporations are the mere creatures of law, established for special purposes, and derive all their powers from the acts creating them, it is perfectly just and proper that they should be obliged strictly to show their authority for the business they assume, and be confined, in their operations, to the mode and manner and subject-matter prescribed." Judge Dillon, in his work on *Municipal Corporations* (§ 89), says: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation — not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied." In *Hopper v. Covington*, 118

U. S. 148, 151 ; 6 Sup. Ct. Rep'r, 1025, this court, in passing upon the power of incorporated towns in Indiana, under laws which we will have to consider and pass upon in this case, said, Mr. Justice Gray delivering the opinion : " When the law confers no authority to issue the bonds in question, the mere fact of their issue cannot bind the town to pay them, even to a purchaser before maturity and for value. *Marsh v. Fulton Co.*, 10 Wall. 676 ; *East Oakland v. Skinner*, 94 U. S. 255 ; *Buchanan v. Litchfield*, 102 U. S. 278 ; *Dixon Co. v. Field*, 111 U. S. 83 ; 4 Sup. Ct. Rep'r, 315 ; *Hayes v. Holly Springs*, 114 U. S. 120 ; 5 Sup. Ct. Rep'r, 785 ; *Davies Co. v. Dickinson*, 117 U. S. 657 ; 6 Sup. Ct., Rep'r, 898." In *Gause v. Clarksville*, 5 Dill. 165, the court, in an able discussion of the inherent and incidental authority of municipal corporations, holds that whether a municipal corporation possesses the power to borrow money, and to issue negotiable securities therefor, depends upon a true construction of its charter and the legislation of the state applicable to it.

In order to determine the question before us, recourse must be had to the statutory enactments, applicable to the subject, that were in force at the time the bonds in this suit were issued, in May, 1878. These enactments are contained in sections 3333, 3342, 3344, 3345, 4486 and 4489 of the Revised Statutes of Indiana of 1881. Section 3333 is a section of the act of 1852 for the incorporation of towns in that state, and contains the usual grant of municipal powers. Section 3342, which was also section 27 of the same act of 1852, provides as follows : " No incorporated town, under this act, shall have power to borrow money or incur any debt or liability, unless the citizen owners of five-eighths of the taxable property of such town, as evidenced by the assessment roll of the preceding year, petition the board of trustees to contract such debt or loan. And such petition shall have attached thereto an affidavit verifying the genuineness of the signatures to the same. And for any debt created thereby the trustees shall add to the tax duplicate of each year successively, a levy sufficient to pay the annual interest on such debt or loan, with an addition of not less than five cents on the hundred dollars, to create a sinking fund for the liquidation of the principal thereof." The other sections contain the provisions of certain statutes passed in 1867, 1869 and 1873. It is only necessary to quote here sections 4488

and 4489, as they embody the provision of the act of 1873, which is itself the statute of 1869, rewritten in order to extend to other purposes not material to this inquiry. "Section 4488. Any city or incorporated town in this state which shall, by the action of its school trustees, have purchased any ground and building or buildings; or may hereafter purchase any ground and building or buildings; or has commenced, or may hereafter commence, the erection of any building or buildings for school purposes; or which shall have, by its school trustees, contracted any debts for the erection of such building or buildings, or the purchase of such ground and building or buildings; or such trustees shall not have the necessary means with which to complete such building or buildings, or to pay for the purchase of such ground and building or buildings, or pay such debt—may, on the filing by the school trustees of said city or town of a report, under oath, with the common council of such city, or the board of trustees of such town, showing the estimated or actual cost of any such ground and building or buildings, or the amount required to complete such building or buildings, or purchase such ground and building or buildings, or the amount of such debt, on the passage of an ordinance authorizing the same by the common council of said city, or the board of trustees of such town, issue the bonds of such city or town to an amount not exceeding, in the aggregate, \$50,000, in denominations not less than \$100, nor more than \$1,000, and payable at any place that may be designated in the bonds (the principal in not less than one year nor more than twenty years after the date of such bonds, and the interest annually or semi-annually, as may be therein provided) to provide the means with which to complete such building or buildings, or to pay for the purchase of such ground and building or buildings, and to pay such debt. Such common council or board of trustees may, from time to time, negotiate and sell as many of such bonds as may be necessary for such purpose, in any place, and for the best price that can be obtained therefor in cash; provided, that such bonds shall not be sold at a price less than ninety-four cents on the dollar. Section 4489. The proceeds of the sales of such bonds shall be paid to the said school trustees, to enable them to erect or complete such building or buildings and pay such debt. But before payment to them such school trustees shall file with the county auditor a bond, payable to the state of Indiana, in a sum not less

than the full amount of the said money so to be paid to them, and with security to be approved by said auditor, conditioned for the faithful and honest application of such money to the purpose for which the same was provided; and such trustees, and their surety or sureties, shall be liable to suit on such bond for any waste, misapplication or loss of such money, in the same manner as now provided for waste or loss of school revenue." We have given these sections in full to show the entire legislation of the state in 1878, upon the subject of the power of towns to borrow money, contract loans, incur debts and issue bonds, so that it may be the more clearly determined whether it anywhere expressly confers upon incorporated towns of the state the general power of issuing, for sale in open market, negotiable securities, in the form of bonds and coupons, which, in the hands of *bona fide* purchasers before maturity, will be subject to no legal or equitable defenses in favor of the maker. In our opinion no such express power is given by these sections, either for the purpose of raising money or funding a previous indebtedness. Obviously, it cannot be found in sections 4488 and 4489, for they relate specifically and exclusively to bonds for school buildings, school grounds and school debts, and prescribe the mode by which bonds may be issued by towns for those specified objects—a mode confessedly not followed, or even attempted to be followed, in issuing the bonds in this suit.

We are confirmed in this conclusion by the view taken in *Hopper v. Covington*, supra: "The averment that the defendant is a municipal corporation under the laws of Indiana, 'with full power and authority, pursuant to the laws of said state, to execute negotiable commercial paper,' if understood as alleging a general power to execute negotiable commercial paper, is inconsistent with the public laws of the state, of which the courts of the United States take judicial notice." The laws of Indiana referred to are those we are now considering. The court also says: "The general statute of May 15, 1869, authorized towns to issue bonds for the purchase and erection of lands and buildings for school purposes only." But the bonds in suit were not issued for either of the purposes named, but to retire and pay off the bonds of 1869. The town had no power to pay off those bonds in this way, viz., by the issue of new bonds, or it could perpetuate a debt forever. Bonds once issued for a lawful purpose must be paid by taxation.

This is manifest from the provision which requires a tax to be levied each year "sufficient to pay the annual interest, with an addition of not less than five cents on the hundred dollars to create a sinking fund for the liquidation of the principal." When bonds are once issued for a lawful purpose, the town is *functus officio* as to that matter. To argue that the old bonds are a debt for school purposes, which may be liquidated by new bonds, is a refinement of construction which the sound sense of the law rejects.

The plaintiff in error relies mainly upon the ground that the authority in question arises, by necessary implication, from the power to make certain expenditures, from the character of the objects to be accomplished by those authorized expenditures, from the necessity of providing the means for paying a previous indebtedness lawfully incurred in such expenditures, and from other powers expressly granted. The line of his counsel's argument, and that of the district judge to whose opinion our attention has been especially called, is this: While section 3342 (the same as section 27 in the act of May, 1852) is not in itself a substantive grant of power, it clearly evinces the legislative intent and understanding that the right to borrow money or otherwise incur any debt or liability might be implied as incidental to the express power given in that or any subsequent act containing not inconsistent provisions, and includes a case like this, where the power is necessary to prevent a default of payment of a previous debt which it was authorized to create. It is insisted, further, that it is the settled doctrine in Indiana that corporations take, by implication, all the reasonable modes of executing their express or substantive powers which a natural person may adopt; and that, in the absence of positive restrictions, a corporation has the power to borrow money as an incident to such power. Section 119, Dillon Municipal Corporations, lays down the Indiana law on this subject substantially as is contended for by the plaintiff in error. That section is as follows: "In Indiana, the doctrine is that corporations, along with the express and substantive powers conferred by their charters, take by implication all the reasonable modes of executing such powers which a natural person may adopt. It is a power incident to corporations, in the absence of positive restriction, to borrow money as means of executing the express powers."

A large number of cases from the supreme court of Indiana are cited in a note to support the doctrine of the text. We think the proposition that, under the laws of Indiana, a town has an implied authority to borrow money, or contract a loan, under the conditions and in the manner expressly prescribed, cannot be controverted. But this only brings us back to the question, does the implied power to borrow money or contract a loan carry with it a further implication of power to issue funding negotiable bonds for that amount, and sell them in open market, as commercial paper? Let us see. Section 3342 is unquestionably a limitation upon the power to borrow money. Its very language is that of mandatory negation: "No incorporated town shall have the power to borrow money, or incur any debt," unless certain conditions precedent are complied with. The conditions which the statute prescribes, the statute means to be performed. There can be no legal borrowing, unless the statute is strictly followed. What does it prescribe? That there must be first a petition to the town trustees, which shall be signed by the citizen owners of at least five-eighths of the taxable property of the town, whose signatures shall be verified by an affidavit to the petition. The prayer of the petition is required to be that the board of trustees shall contract such debt or loan. The board could not depart, in its action, from this legally-required prayer of the petition without transcending its authority, and acting *ultra vires*. But the board did depart from the prayer, for it did not borrow money nor contract a loan; but it ordained, in so many words, that the town issue bonds for negotiation and sale at not less than ninety-four cents on the dollar. We think the words of Chief Justice Marshall, in *Head v. Insurance Co.*, 2 Cranch, 127, 169, aptly characterize this transaction, and bear upon the points which are the subject of this controversy. Speaking of bodies corporate which have only a legal existence, he said: "The act of incorporation is to them an enabling act. It gives them all the power they possess. It enables them to contract, and when it prescribes to them a mode of contracting, they must observe that mode, or the instrument no more creates a contract than if the body had never been incorporated." See, also, *Insurance Co. v. Ely*, 5 Conn, 560; *McCracken v. City of San Francisco*, 16 Cal. 619.

It is admitted that the power to borrow money or to incur indebtedness carries with it the power to issue the usual evidences of indebtedness by the corporation to the lender or other creditor. Such evidences may be in the form of promissory notes, warrants, and, perhaps, most generally, in that of a bond. But there is a marked legal difference between the power to give a note to a lender for the amount of money borrowed, or to a creditor for the amount due, and the power to issue for sale, in open market, a bond, as a commercial security, with immunity, in the hands of a *bona fide* holder for value, from equitable defenses. The plaintiff in error contends that there is no legal or substantial difference between the two; that the issuing and disposal of bonds in market, though in common parlance, and sometimes, in legislative enactments, called a "sale," is not so in fact; and that the so-called purchaser who takes the bond and advances his money for it is actually a lender, as much so as a person who takes a bond payable to him in his own name. We think the case of *Police Jury v. Britton*, 15 Wall. 566, is directly and absolutely conclusive against the position of the plaintiff in error on this point. It was an action upon coupons of certain bonds issued by the police jury of Tensas parish, La., the validity of which the defendant denied, upon the ground that they were issued without the authority of any law of that state. It appeared that the police jury had no express authority to issue the bonds in question; and, if they had any authority of the kind, it must be implied from the general powers of administration with which the said police jury was invested. The question, therefore, directly presented in that case was precisely the question directly presented in this case, viz., whether the trustees or representative officers of a parish, county or other local jurisdiction, invested with the usual powers of administration, in specific matters, and the power of levying taxes to defray the necessary expenditures of the jurisdiction, have an implied authority to issue negotiable securities, payable in future, of such a character as to be unimpeachable in the hands of *bona fide* holders, for the purpose of raising money or funding a previous indebtedness. The opinion of the court, delivered by Mr. Justice Bradley, clearly illustrated the fundamental distinction between issuing bonds merely as evidence of a debt or loan and issuing bonds for negotiation and sale generally,

with respect to the powers of a municipal corporation. It said: "That a municipal corporation which is expressly authorized to make expenditures for certain purposes may, unless prohibited by law, make contracts for the accomplishment of the authorized purposes, and thereby incur indebtedness, and issue proper vouchers therefor, is not disputed. This is a necessary incident to the express power granted. But such contracts, as long as they remain executory, are always liable to any equitable considerations that may exist or arise between the parties, and to any modification, abatement or rescission, in whole or in part, that may be just and proper in consequence of illegalities, or disregard or betrayal of the public interests. Such contracts are very different from those which are in controversy in this case.

The bonds and coupons on which a recovery is now sought are commercial instruments, payable at a future day, and transferable from hand to hand. * * * The power to issue such paper has been the means, in several cases which have recently been brought to our notice, of imposing upon counties and other local jurisdictions burdens of a most fraudulent and iniquitous character, and of which they would have been summarily relieved had not the obligations been such as to protect them from question in the hands of *bona fide* holders. * * * It seems to us to be a power quite distinct from that of incurring indebtedness for improvements actually authorized and undertaken, the justness and validity of which may always be inquired into. It is a power which ought not to be implied from the mere authority to make such improvements." The plaintiff in error quotes from the opinion in that case, to support his contention, the following: "We do not mean to be understood that it requires, in all cases, express authority for such bodies to issue negotiable paper. The power has frequently been implied from other express powers granted. Thus it has been held that the power to borrow money implies the power to issue the ordinary securities for its repayment, whether in the form of notes, or bonds payable in future." We think the significance of these sentences, as applicable to the facts of this case, can be clearly discerned from the following concluding sentences of the paragraph: "But in our judgment these implications should not be encouraged or extended beyond the fair inferences to be gathered from the circumstances of each case.

It would be an anomaly, justly to be deprecated, for all our limited territorial boards, charged with certain objects of necessary local administration, to become the fountains of commercial issues, capable of floating about in the financial whirlpools of our large cities." The same doctrine is presented most forcibly in the case of *Mayor v. Ray*, 19 Wall. 468. In *Claiborne Co. v. Brooks*, 111 U. S. 400, 406; 4 Sup. Ct. Rep'r, 489, it was held that the statutes of Tennessee, which conferred upon counties in that state the power to erect a court-house, jail and other necessary county buildings, did not authorize the issue of commercial paper as evidence of or security for a debt contracted for the construction of such a building. Referring to the view of the court below in that case, which held that, as the county had power to erect a court-house, that power implied the power to contract out the work, and to issue negotiable bonds of a commercial character in payment thereof, Mr. Justice Bradley, who delivered the opinion of the court, said: "We cannot concur in this view. The erection of court-houses, jails and bridges is amongst the ordinary political or administrative duties of all counties; and from the doctrine of the charge it would necessarily follow that all counties have the incidental power, without any express legislative authority, to issue bonds, notes and other commercial paper in payment of county debts and charges; and if they have this power, then such obligations issued by the county authorities, and passing into the hands of *bona fide* holders, would preclude the county from showing that they were issued improperly, or without consideration, or for a debt already paid; and it would then be in the power of such authorities to utter any amount of such paper, and to fasten irretrievable burdens upon the county without any benefit received. Our opinion is that mere political bodies, constituted, as counties are, for the purpose of local police and administration, and having the power of levying taxes to defray all public charges created, whether they are or are not formally invested with corporate capacity, have no power or authority to make or utter commercial paper of any kind, unless such power is expressly conferred upon them by law, or clearly implied from some other power expressly given, which cannot be fairly exercised without it;" citing *Police Jury v. Britton*, 15 Wall. 566; *Mayor v. Ray*, 19 Wall. 468. In *Young v. Clarendon Tp.*, 132 U. S. 340, 347; 10 Sup. Ct.

Rep'r, 107, many of the decisions bearing on this question were referred to, and the court said: "Even where there is authority to aid a railroad, and incur a debt in extending such aid, it is also settled that such power does not carry with it any authority to execute negotiable bonds, except subject to the restrictions and directions of the enabling act;" citing *Wells v. Supervisors*, 102 U. S. 625; *Claiborne Co. v. Brooks*, 111 U. S. 400; 4 Sup. Ct. Rep'r, 489; *Kelley v. Milan*, 127 U. S. 139; 8 Sup. Ct. Rep'r, 1101. In *Hill v. Memphis*, 134 U. S. 198, 203; 10 Sup. Ct. Rep'r, 562, it was held that the power conferred by statute on municipal corporations to subscribe for stock in a railway corporation did not include the power to create a debt and issue negotiable bonds in order to pay for that subscription. In delivering the opinion of the court, Mr. Justice Field said: "Whilst a municipal corporation, authorized to subscribe for the stock of a railroad company, or to incur any other obligation, may give written evidence of such subscription or obligation, it is not thereby empowered to issue negotiable paper for the amount of indebtedness incurred by the subscription or obligation. Such papers in the hands of innocent parties for value cannot be enforced without reference to any defense on the part of the corporation, whether existing at the time or arising subsequently. Municipal corporations are established for purposes of local government, and, in the absence of specific delegation of power, cannot engage in any undertakings not directed immediately to the accomplishment of those purposes. Private corporations created for private purposes may contract debts in connection with their business, and issue evidence of them in such form as may best suit their convenience. The inability of municipal corporations to issue negotiable paper for their indebtedness, however incurred, unless authority for that purpose is expressly given or necessarily implied for the execution of other express powers, has been affirmed in repeated decisions of this court." All of the cases we have cited above were referred to in the opinion in that case as sustaining the doctrine therein laid down.

The logical results of the doctrines announced in the above-cited cases, in our opinion, clearly shows that the bonds sued on in this case are invalid. It does not follow that, because the town of Monticello had the right to contract a loan, it had, therefore, the

right to issue negotiable bonds and put them on the market as evidences of such loan. To borrow money, and to give a bond or obligation therefor which may circulate in the market as a negotiable security, freed from any equities that may be set up by the maker of it, are, in their nature and in their legal effect essentially different transactions. In the present case all that can be contended for is that the town had the power to contract a loan under certain specified restrictions and limitations. Nowhere in the statute is there any express power given to issue negotiable bonds as evidence of such loan. Nor can such power be implied, because the existence of it is not necessary to carry out any of the purposes of the municipality. It is true that there is a considerable number of cases, many of which are cited in the brief of counsel for plaintiff in error, which hold a contrary doctrine. But the view taken by this court in the cases above cited and others seems to us more in keeping with the well-recognized and settled principles of the law of municipal corporations; for, as is said in *Dillon Municipal Corporations* (3d ed.), section 507: "The frauds which unscrupulous officers will be enabled successfully to practice, if an implied and unguarded power to issue negotiable securities is recognized, and which the corporation or the citizen will be helpless to prevent, is a strong argument against the judicial establishment of any such power. And the argument is unanswerable, when it is remembered that in ascertaining the extent of corporate powers there is no rule of safety but the rule of strict construction, and that such an implied power is not necessary, however convenient it may be at times, to enable the corporation to exercise its ordinary and usual express powers, or to carry into effect the purposes for which the corporation is created. We regard as alike unsound and dangerous the doctrine that a public or municipal corporation possesses the implied power to borrow money for its ordinary purposes, and, incidental to that, the power to issue commercial securities. The cases on this subject are conflicting, but the tendency is toward the view above indicated. The opinion of Mr. Justice Bradley in a case before referred to (*Mayor v. Ray*) evinces a thorough comprehension of the whole question, and, in our judgment, is sound in every proposition it advances, and must become the law of this country. This view is confirmed by the almost invariable legislative practice in the states to confer, when

it is deemed expedient, upon municipalities and public corporations, in express terms, the power to borrow money or to issue negotiable bonds or securities."

In the case before us the power in question is not, in our opinion, indispensable to the exercise of the express or implied powers conferred upon the town by law. The utmost that can be said is that it was deemed more convenient or expedient to issue the bonds in that form than in the mode prescribed. We think that the fact that the legislature of the state of Indiana by the acts of 1867, 1869 and 1873, above referred to, expressly authorized towns in the same class as the defendant in error to issue bonds for certain specified purposes, under proper safeguards and limitations, is indicative of the legislative understanding that, without some such express statutory provisions, no power existed in the town to issue negotiable bonds, and sell them in open market. The same may be said of the act of the legislature of that state which took effect August 24, 1879, expressly conferring upon the towns in that state power to fund their indebtedness by issuing bonds and negotiating them for that purpose, under certain specified terms, restrictions and limitations. We are not unmindful that in several of the cases in the supreme court of Indiana, cited by counsel for plaintiff in error, there may be found abstract propositions susceptible of a construction in support of the position he seeks to maintain; but we think this case is distinguishable from them all in essential features, which exempt it from those general propositions, and leave the conclusion which we have reached in harmony with them.

It is contended that the bonds sued on were issued practically for the purpose of taking the place of the prior bonds, outstanding and unpaid, which represented a debt for the erection of a school building, and were, therefore, authorized by section 4488. This position is untenable. It cannot be reasonably contended that the bonds were issued under any of the sections relating to the negotiation and sale of bonds for school purposes. It is not even pretended that they were issued in accordance with the clearly-defined conditions and restrictions imposed by those sections. Nor do we think the fact that the town actually received a portion of the money arising from the sale of the so-called bonds (or, in legal contemplation, perhaps all of it, as it was paid to the agent of the

town) estops the corporation from pleading a want of authority in the municipality to issue the instruments sued on. The original act of issuing the bonds for sale was not only unauthorized by law, but in disregard of its requirements, and no subsequent act of the town trustees could make it valid. Whether it could be a circumstance in favor of the equitable right of the holders of the bonds to recover from the municipality the money which they represent is a question not here for consideration. The suit was upon the bonds themselves, and for the reasons above stated we hold that there can be no recovery upon them. Judgment affirmed.

Brown, J., was not a member of the court when this case was argued, and took no part in its decision.

Fuller, C. J., and Brewer, J., were not present at the argument, and took no part in the decision.*

MUNICIPAL AND RAILROAD AID BONDS — RECENT DECISIONS.

1. **Constitutional provisions — Illinois.** — The Illinois constitution of 1870 forbade the issuance of railroad aid bonds, except where they had been authorized before its adoption, by a vote of the people under *existing laws*. Held, where such bonds were authorized at an election irregularly held, a ratification of such election by the legislature before the adoption of the constitution does not validate the bonds, issued after the constitution was adopted, since the "existing laws" referred to in the constitution are the laws in force when the election was held. *Williams v. People, ex rel., etc.*, 133 Ill. 574; 24 N. E. Rep'r, 647. Bonds issued pursuant to a vote taken after the adoption of the constitution are void. *Casey v. People, ex rel. Patton*, 132 Ill. 546; 24 N. E. Rep'r, 570.

2. **Constitutional provision forbidding municipal aid to any corporation — effect upon bonds placed in escrow before its adoption.** — Constitution of New York, article 8, section 11, which prohibits counties, cities, towns and villages from loaning money or credit to aid any corporation, did not affect a valid and binding contract made before its adoption, by which a town had deposited its bonds in escrow, to be delivered to a railroad company on the completion of a road, and on the faith of which the company was building the road, *Cherry Creek v. Becker*, 123 N. Y. 161; 25 N. E. Rep'r, 869.

3. **Constitutional provision limiting amount of issue — rights of holders where limit exceeded.** — By the constitution of Texas, article 8, section 9, and article 11, sections 4, 5 and 7, the power of a city of one thousand inhabitants or less, to create debts is limited to a sum, the interest and two per cent of the principal of which can be paid out of a levy of 25 cents on each \$100 of the last assessment of the property for taxes — held, that purchasers of bonds issued by the city must take notice of the assessment for taxes, and no recital in the bonds can estop the city from denying the validity of bonds issued in excess

*Reported in 11 Sup. Ct. Rep'r, 441; 133 U. S. 673.

of the amounts authorized. *Citizens' Bank v. City of Terrell*, 78 Tex. 450; 14 S. W. Rep'r, 1008. If the bonds issued were delivered at different dates, those first delivered up to the amount of the debt the city could lawfully create should be paid, and the others should be treated as nullities; but if the bonds were delivered at the same time, so that none has priority over the others, the amount of the valid debt should be distributed equally between the bonds. *Ibid*.

4. **Evading constitution — municipality constructing road to be operated by private corporation.**—Laws Ohio 1380, page 157, which authorize a certain township to construct a few miles of railroad within its limits, intended to ultimately form part of a continuous line of road to be operated and equipped by private capital, violates Constitution Ohio, article 8, section 6, which prohibits the general assembly from authorizing any county, city, town or township to become a stockholder in any private corporation, or to raise money for or loan its credit to or in aid of such corporation, and bonds issued under the act are void. *Pleasant Township v. Aetna Life Ins. Co.*, 188 U. S. 67; 11 Sup. Ct. Rep'r, 215.

5. **Right of tax-payer to question validity of bonds — effect of laches.**—The statute of limitations does not run against the right of a tax-payer to contest, by equitable proceeding, the validity of the election by which it was determined to issue township bonds in aid of a railroad, but such action must be brought within a reasonable time after the election, and before the rights of third persons have accrued under the action of the authorities who have issued the bonds in accordance with the result of the election, and where the action is delayed for three years after the election and issuance of the bonds, plaintiffs are not entitled to relief by injunction to restrain the commissioners from collecting the taxes to pay the interest on the bonds as provided in the law authorizing the election. *Jones v. Comrs. of Person*, 107 N. C. 248; 13 S. E. Rep'r, 69.

6. **Long acquiescence of municipality — effect upon equitable remedy.**—Where a town has issued bonds and has paid interest upon them for six years without questioning their validity, a court of equity will not, at the town's instance, cancel them in the hands of an innocent purchaser for value, even though they are actually invalid. *Cherry Creek v. Becker*, 128 N. Y. 161; 25 N. E. Rep'r, 369.

7. **Enjoining issue — irregular election.**—In an action to enjoin the issuing of certain bonds of a city to be donated to a railway company upon the completion of its road, it appeared that the whole question had not been submitted to the electors of the city, and that no vote had been submitted or adopted for the payment of the principal at any time. Held, that the injunction granted by the court below would be affirmed. *Cook v. City of Beatrice* (Neb.), 48 N. W. Rep'r, 828.

8. **Distinction between suit to enjoin issue and one to resist payment.**—A much stronger case is required to enjoin the collection of taxes levied for the payment of interest or principal of bonds issued in pursuance of apparent authority, and which have been duly registered and passed into the hands of *bona fide* purchasers, than to prevent the issuing of such bonds upon specified grounds, which might invalidate them. *Ibid*.

9. **Bonds dependent upon condition to build road — what amounts to**

performance — use of another's tracks.— Where the issuing of township bonds or warrants to a railroad company is dependent upon the condition that the company shall build or cause to be built and have in operation, with cars running thereon, by lease or otherwise, its railroad from a certain city therein named, at or near the depot of another railroad company in the city, held, that the building of its road within one hundred and eleven and one-half feet of the limits of the city, and an arrangement by it with the other railroad company, whose road it intersects at that point, for the running of its trains over the road from its intersection to its depot within the city, and the operation of the road from the depot in the city, over its entire line, will be regarded as a substantial compliance with the condition. *Chicago, etc., R. Co. v. Makepeace*, 44 Kans. 676; 24 Pac. Rep'r, 1104.

10. Recitals in bonds — effect of.— A recital in bonds of a village, which were in fact issued in violation of law, over the signature of the clerk and president of the village, that they were "issued in conformity with the general laws of the state, * * * and authorized by the board of trustees," raises no conclusive presumption of the existence of precedent conditions, and affords no protection to the holder as a *bona fide* purchaser for value. *Spitzer v. Village of Blanchard*, 83 Mich. 234; 46 N. W. Rep'r, 400.

11. Bonds authorized on recommendation of grand jury — discretion to be exercised.—Act Pennsylvania May 4, 1852, a supplement to an act incorporating the Pittsburg and Erie Railroad Company, provides that subscriptions to the stock of said railroad company by defendant and other counties "shall be made by the county commissioners after, and not before, the amount of such subscriptions shall have been designated, advised and recommended by the grand jury." Held, that bonds of the county given for stock subscribed for by the commissioners, on the recommendation only of the grand jury that they subscribe for an amount not exceeding \$150,000, were illegal, as all discretionary power was vested in the grand jury by said act. *Frick v. Mercer County*, 188 Penn. St. 523; 21 Atl. Rep'r, 6.

12. Interest on overdue coupons — liability of municipality.— Where bonds were issued under a special statute which provided for the payment of the principal and annual interest, and nothing more, and which created a specific fund for the payment of the bonds, the city, on the insufficiency of the fund for any one year to meet the annual interest, does not become liable to pay interest on overdue coupons, under the general statute providing for interest on all contracts after maturity. *Bates v. Gerber*, 83 Cal. 550; 22 Pac. Rep'r, 1115.

13. Election — effect of submitting additional questions not authorized.— Where an election is called for the purpose of voting on a proposition to issue bonds in aid of a certain railroad, the submission to the voters at the same election of a proposition to aid any railroad that may be built between two certain points within the next five years, though improper, does not invalidate bonds issued to the first-named railroad in pursuance of such election, after such bonds have passed into the hands of innocent purchasers. *Williams v. People, ex rel., etc.*, 132 Ill. 574; 24 N. E. Rep'r, 647.

14. Election — notice.— Where the notice, required by statute, of an election for the issue of bonds is not given, the election will confer no authority to issue the bonds, and the fact that there was not time to give the requisite

notice between the order calling the election and the date of the election is sufficient evidence that legal notice was not given. *Williams v. People*, ex rel., etc., 182 Ill. 574; 94 N. E. Rep'r, 647.

15. Bonds issued upon conditions not mentioned in statute.—Where a town is authorized to subscribe for railroad stock, and to issue bonds in payment therefor, the fact that such bonds are issued upon condition that the road should build its shops in that town does not invalidate the bonds, since the imposing of such condition does not change the object for which the bonds were issued. *Casey v. People*, ex rel., etc., 132 Ill. 546; 24 N. E. Rep'r, 570.

16. Bonds issued by county irregularly organized.—Though the organization of a county was confessedly fraudulent, where it was afterward recognized as valid by the legislature, it is binding, and bonds of such county which are regular on their face are valid obligations in the hands of *bona fide* purchasers before maturity. *Harper County v. Rose*, 140 U. S. 71; 11 Sup. Ct. Rep'r, 710.

17. Where regularity of steps are determined by county judge before issue—effect of judgment.—Where, under Laws New York 1869, chapter 907, as amended by Laws 1871, chapter 925, a county judge determined that petitions presented for the issuance of bonds to aid in the construction of a railroad were signed by a majority of the tax-payers of the town, who represented a majority of its taxable property, the regularity of the steps prior to such determination cannot be questioned, except by direct proceedings to review his judgment. *Cherry Creek v. Becker*, 128 N. Y. 161; 25 N. E. Rep'r, 869.

18. Taxation to pay interest—statutes construed.—Laws Missouri, 1851, pages 483, 486, authorizing counties to subscribe to the stock of a certain railroad provide that the county may issue bonds "to raise funds to pay the stock thus subscribed, and to take proper steps to protect the interest and credit of the county." Held, that this confers authority to levy a tax sufficient to pay the interest on such bonds, though the general laws restrict the tax rate "for county purposes" to one-half of one per cent. *Scotland County v. United States*, ex rel., etc., 140 U. S. 41; 11 Sup. Ct. Rep'r, 697.

MOON V. NORTHERN PAC. R. CO.

(Supreme Court of Minnesota, April 23, 1891.)

1. RAILROAD COMPANIES. INJURY TO EMPLOYEE. LIABILITY OF COMPANY, OWNING CAR TO SERVANTS OF CONNECTING LINE. Where, as between connecting lines of railway, the corporations controlling them are mutually bound to transport loaded freight-cars over their respective roads, such duty is necessarily subject to proper rules and regulations, and involves mutual obligations, among which is that of due diligence to provide safe cars for delivery to the servants of the company operating the connecting line to which they are transferred, and who would be exposed to danger from their defective or unsafe condition.

2. DUTIES AND LIABILITIES OF CONNECTING LINE AS TO SUCH CARS. The

corporation receiving such cars is also subject to liabilities and duties to its servants growing out of the acceptance, possession and subsequent use thereof. But the negligence of the latter does not relieve the former from liability for injuries resulting from its own negligence.

3. DEFECTIVE BRAKE. INSPECTION. NEGLIGENCE. Where a brake upon a freight car so transferred by the corporation owning it was out of repair and unsafe for use, and the same had not been inspected with due care before delivery to the servants of a connecting company, and in consequence of such defect a brakeman was injured without fault on his part, held, that an action would lie for the injury against the first-named company.

4. Held, also, that the questions as to the condition of the brake, the length of time it had been out of repair, and whether it had been inspected with due care, were properly submitted to the jury.

5. EVIDENCE. OPINION AS TO AGE OF FRACTURE. Where the accident was caused by the breaking of a brake-staff, a witness who has been a hardware merchant, and states that he knows the difference between an old break and a new one, may give his opinion as to whether the fracture was old or not.

A PPEAL from district court, Ramsey county, Wilkin, judge.

F. S. Kirkpatrick (*John C. Bullitt, Jr.*, of counsel) for appellant. *Lovely & Trask* for respondent.

VANDEBURGH, J. Plaintiff's intestate, who was a brakeman in the employ of the St. Paul, Minneapolis and Manitoba Company was killed while attempting to set a brake upon a loaded freight-car of the defendant, Northern Pacific Railroad Company, which had been transferred by the latter to the track of the Manitoba Company in the village of Morris, in this state, for transportation over the road of the latter to a point thereon. There was a traffic arrangement existing between these two companies in pursuance of which loaded freight-cars were mutually transferred and transported over their respective lines, and cars of the Northern Pacific Company, destined to points on the Manitoba road, were transferred from its line to a side track, in the yard of the latter company at Morris, designated and set apart as a transfer track, whence, if in good order, they were placed in its trains by that company, and transported to particular stations. The car in question was loaded with wood to be shipped to Herman, a station on the Manitoba road a few miles west of Morris. When it arrived at Morris, on the 3d day of April, it was placed on the transfer track in the yard of the Manitoba Company, above referred to. According to the rule adopted by the companies, such cars were required

to be inspected by the car inspectors of both on that track, and, if any repairs were needed, they were required to be made by the Northern Pacific Company before they were transferred and received by the Manitoba Company. Accordingly this car was so inspected by the car inspectors on the morning of April 4. It was examined by them together at the same time, and they agreed that it was in good order. In the afternoon of the same day, the car was taken off this track by the Manitoba Company, to be placed in a train for transportation, and was switched onto another track, where the conductor ordered the deceased to set the brake on it so as to hold it securely on a descending grade. The brake-staff proved defective, and was insufficient to hold the loaded car in its place, but broke and precipitated him upon the track, and he was run over. It is claimed by the plaintiff that the brake-staff was cracked and partly broken before its use at the time of the injury, and that the defendant, Northern Pacific railroad, is liable in damages for negligence in permitting it to be out of repair and unsafe, and also that the car was not properly or carefully inspected by the inspectors of the respective companies, and that the work was superficially and negligently done. The action was brought against both companies, but a verdict was recovered against the Northern Pacific Railroad Company only.

1. We are to inquire whether the relations of the deceased as an employe of the Manitoba Company to the defendant, the Northern Pacific Railroad Company, were such as to entitle plaintiff to maintain an action against the latter for its alleged negligence. As respects the transportation of freight in bulk from stations on one line to those on the other, the two roads are operated together, and it is immaterial whether such transportation by connecting lines is carried on in obedience to a statute, their common-law duty as carriers, or by mutual agreement; neither company is obliged to draw the cars of the other over its line, if they are unsafe or out of repair. *Mackin v. Railroad Co.*, 135 Mass. 201; *Gottlieb v. Railroad Co.*, 100 N. Y. 469; 3 N. E. Rep'r, 344. It is, then, the primary duty of the company seeking such transportation to use due diligence to provide cars reasonably safe for the service contemplated.

The rule above referred to, adopted by these companies, requiring the Northern Pacific Railroad Company to inspect and repair

cars before transfer and acceptance, is a recognition of this duty. But such duty is not limited to the corporation as such, but extends to and is owed to the servants, who must necessarily handle the cars, and who are exposed to danger arising from their unsafe or defective condition. One may owe two distinct duties in respect to the same thing — one of a special character to one person, growing out of special relations to him; and another of a general character, to those who would necessarily be exposed to risk and danger from the negligent discharge of such duty. 1 Shear. & R. Neg., § 116; Bigelow Cas. Torts, 614. Subject to proper limitations, the rule generally stated is that if a reasonable man must see that, if he did not use due care in the circumstances, he might cause injury to the person or property of another entitled to repose confidence in his diligence, a duty arises to use such care. Smith Neg. 12, and notes; *Heaven v. Pender*, 11 Q. B. Div. 506. In this last case, *Winterbottom v. Wright*, 10 Mees. & W. 109, and other cases relied on by the defendant, are explained and distinguished. See, also, Pol. Torts, 449. We do not inquire as to the application of the rule here considered to intermediate carriers.

The delivery of the car to the servants of the Manitoba Company was an affirmation that the car was fit for use, and the latter were entitled to repose confidence in the implied assurance that such was the fact.

Undoubtedly, by virtue of the relation of master and servant, the Manitoba Company would be liable to its employes if it undertook to use cars of another company without due inspection, and they should turn out to be defective and unsafe by reason of defects which might be ascertained by a reasonably careful inspection. *Gottlieb v. Railroad Co.*, supra; *Fay v. Railway Co.*, 30 Minn. 231; 15 N. W. Rep'r, 241. But, as respects the condition of the car at the time it was delivered, the Manitoba Company did not owe the duty of inspection and repair to the Northern Pacific Railroad Company. It might refuse to receive and haul it, if not in good condition, but the primary duty to use due diligence to see that the car was then safe and in suitable repair rested upon the latter company, though the Manitoba Company might also be subject to liabilities and duties, in respect to the car, growing out of its acceptance, possession and subsequent use. And the com-

pany owning the car should be held responsible for the consequences of its own wrongful or negligent acts or omissions, notwithstanding concurring negligent acts or omissions of the company receiving the car. The negligence of the latter does not excuse or relieve the former from liability for injuries resulting from its negligence. The proximate cause of an event must be understood to be that which in a natural and continuous sequence, unbroken by any new cause, produces that event, and without which that event would not have occurred. 1 Shear. & R. Neg., § 26. And if the original wrong only becomes injurious through some distinct wrongful act or neglect of another, the last wrong is the proximate cause, and the injury should be imputed to the last wrong, and not to that which is more remote. In order to relieve the first wrong-doer, there must intervene between him and the plaintiff an independent responsible agent, breaking the causal connection. Whart. Neg., § 438. We do not think such a case is here presented. The duty to exercise due care in the premises devolved on each company. Neither can excuse itself through the default of the other. Besides, in this case the inspection by the two companies was substantially one transaction, in pursuance of a mutual arrangement under which it was made jointly by the two car inspectors. The case of *Bartlett v. Gas Co.*, 117 Mass. 533, is we think clearly distinguishable. *Burt v. Boston*, 122 Mass. 227. And *Child v. Hearn*, L. R., 9 Exch. 176, if in point, would hardly be accepted as authority on the questions here involved. Pol. Torts, 385. This case also differs from *Sawyer v. Railway Co.*, 38 Minn. 103; 35 N. W. Rep'r, 671, in its facts. There the defective car did not come into the hands of the plaintiff by the consent or authority of the owner, but was in the possession of another company, the plaintiff's master, who had undertaken to use it in transporting freight on its own road, after it should have been returned to the company owning it.

2. The brake-staff was not permanently fastened to the car. It consisted of an iron rod about three feet long, with a hand wheel attached to the upper end, and used to turn or apply the brake, while the lower end was dropped into a socket fixed to the car, and could be lifted out at pleasure. That part of the lower end which entered the socket was five or six inches in length to the collar, which rested thereon, and was upward of an inch in

diameter, a was necessarily subjected to a severe strain in setting the brake, so as to stop or hold a loaded car. It is claimed by the plaintiff that there was a defect or crack near the lower end of the staff which weakened it, and rendered it unsafe, when it was turned over to the Manitoba Company, and which caused it to break when the deceased was in the act of setting the brake, and he was in consequence suddenly precipitated upon the track, and fatally injured. The evidence in the case tends to establish the existence of such defect, and to show that the accident resulted from it. Upon the question of defendant's negligence, the court refused to take the case from the jury, and this is assigned as error. The car was looked over and examined by the inspectors, but their attention was not specially called to the brake-staff, nor was it particularly examined. Neither of them lifted it out of the socket, nor is there evidence of any previous careful examination of it. We think the court did not err in refusing to take the case from the jury.

There was also sufficient to send the case to the jury upon the question whether the defect in the brake complained of existed at all, and, if so, whether it had been there a considerable length of time before the accident, whether it was discoverable in the exercise of reasonable diligence by the defendant, and, finally, upon the question of the measure of diligence used. One of the plaintiff's witnesses, who had examined the staff soon after it was broken, testified that there was an old fracture extending over one-third the way across it, and that the new fracture was a continuation of the old. This alleged defect was just below the collar, and inside the socket. It was the duty of the defendant to exercise reasonable diligence in the examination and supervision of such appliances, which, being in constant use, are liable to get out of repair, and the measure of care and diligence must be proportioned to the risk and danger to be apprehended; and if the safety of an employe depended upon the strength and soundness of that portion of the brake-staff in question here it was the duty of the company to use reasonable diligence to make and keep it safe, and to this end the inspection should have been seasonable and adequate, and should have extended to that portion thereof which rested in the socket. We are unable to say that the evidence did not warrant the jury in finding that, by the exercise of

reasonable care, the defect might not have been seasonably discovered and repaired, and think that this question, which is perhaps left most in doubt of any in the case, was properly submitted to the jury.

The evidence does not conclusively establish contributory negligence on the part of the deceased. It is not necessary to review it. It is enough to say that this question, if raised at all by the evidence, was for the jury.

It is also urged that the court erred in admitting the testimony of the witness Collier in respect to the character of the fracture in the staff, on the ground that no proper foundation had been laid for his testimony. The witness had examined the broken pieces of the rod after the accident, and testified as to their appearance, and stated that he had been in the hardware business, and "knew the difference between an old break and a new one." He was thereupon permitted to testify in respect to the character of this "break," that in his judgment it was an old fracture. There was no abuse of discretion or legal error in allowing the witness to testify. There was some foundation, at least, for his opinion, and its value might be further tested, as it was, by cross-examination. The case was fairly tried, and was submitted to the jury under clear, careful and impartial instructions. Upon a full examination of the entire record, in connection with the points raised by appellant, we do not feel warranted in overruling the decision of the trial court refusing a new trial. Judgment affirmed. *

Railroad companies — accident to employe — duty and liability of company receiving and using a foreign car. — It is the duty of a railroad company to inspect a freight-car, and to see that it is reasonably fit for service before it is received from another company, and, in the event that a freight-car is received with a brake-beam in such a defective condition that a brakeman, whose duty it is to couple the foreign car with those used by the company receiving it, is injured in his attempt to make such coupling, and the brakeman has no knowledge of the condition of such brake-beam, and its condition cannot be readily seen, the company that employs him and received such car in a defective condition is liable for such injury. *Missouri Pac. Ry. Co. v. Barber*, 44 Kana. 612; 24 Pac. Rep'r, 969. The following cases also support the proposition that a railroad company, which negligently receives and uses a foreign car that is in a defective condition, will be liable to an employe who, having no knowledge of the defect, is injured thereby. *International, etc., R. Co. v. Kernan*, 78 Tex. 294; 14 S. W. Rep'r, 668; *Bonar v. Louisiana, etc., R. Co.*,

* Reported in 48 N. W. Rep'r, 679.

42 La. Ann. 983; 8 So. Rep'r, 478; Missouri Pac. Ry. Co. v. White, 76 Tex. 102; 13 S. W. Rep'r, 65; Texas & Pac. Ry. Co. v. O'Feil, 78 Tex. 486. It is the duty of the company to ascertain the defect if it can do so by the exercise of reasonable care, and then to decline to receive the car, or to remedy the defect, or to specially caution its employes in regard to the use of the car. *Ibid.* The employe will not be deemed guilty of contributory negligence in using the defective car, unless he is aware of the defect or it is of such a character that he ought to have observed it. *Ibid.*

GEORGIA PAC. RY. CO. V. DAVIS.

(Supreme Court of Alabama, April 30, 1901.)

1. RAILROAD COMPANIES. INJURY TO BRAKEMAN BY PROJECTING ROCK. PLEADING. In an action by a brakeman against a railway company for negligence in allowing a rock to project too far in one of its cuts, an allegation that plaintiff was injured because defendant allowed its road-way to become so "greatly out of repair, unsafe and dangerous" that "by reason thereof the plaintiff, while in the performance of his duties as * * * brakeman, was violently struck against a projecting rock," sufficiently stated the defect relied upon.

2. A count sufficiently alleging such negligence was not demurrable, because it also purported, but failed, to charge negligence on the part of the conductor in ordering plaintiff to ascend to the top of the train at the point of the defect, since the company was liable without the concurring negligence of the conductor.

3. DUTY OF COMPANY AS TO OBSTRUCTIONS NEAR TRACK. Where it is customary for brakemen in the performance of their duties to ascend and descend from the tops of cars by side-ladders, while the train is in motion, the company is bound to maintain its road-way free from projections which endanger them while so doing.

4. CONTRIBUTORY NEGLIGENCE. WHETHER KNOWLEDGE OF DEFECT PRESUMED. A trainman who has no functions to perform in keeping the road-way in repair is not presumed to have knowledge of such defect, when it has never been imparted to him, but has a right to assume that the road-way is in all respects safe and sufficient for the discharge of his duties.

5. RULES OF COMPANY. EFFECT WHEN NOT KNOWN TO EMPLOYEE. Although two rules of the company, in a book containing five hundred rules, required the constant presence of brakemen at the brakes on top of the train, a brakeman who, in accordance with usage and with the conductor's sanction, remained in the caboose a part of the time during inclement weather, and who was injured while ascending to his post of duty in accordance with the conductor's order, was not negligent when there was no evidence that he was ever required to learn such rules, or did in fact know of them.

6. It was harmless error to charge that the brakeman was not negligent in disregarding known rules of the company if the conductor assented thereto, when the evidence showed the brakeman's ignorance of such rules.

7. **EFFECT OF DELAY IN EXECUTING ORDER OF CONDUCTOR TO GO TO TOP OF TRAIN.** Where there is evidence tending to show that, if such order had been executed on the instant, the accident might not have occurred, failure to so execute it is not negligence on the brakeman's part when he delayed only a moment or two to put on his overcoat and gloves, the weather being inclement.

8. **CONTRIBUTORY NEGLIGENCE. BURDEN OF PROOF.** The burden of proving contributory negligence is on defendant.

A PPEAL from city court of Birmingham, H. A. Sharpe, judge.

This action was brought by Thomas F. Davis, against the Georgia Pacific Railway Company, to recover damages for personal injuries alleged to have been sustained by the negligence of the defendant in allowing a rock to project too far in one of the cuts on its road-way. There were two counts in the complaint, and to each of these counts the defendant demurred, and its demurrer was overruled by the court. Upon the evidence as adduced the court gave the following charge in writing at the request of the plaintiff: "(10) The conductor, Edmonds, was charged with the administration of the company's rules while running the train, and his assent that a brakeman should vary from such rules was the assent of the company, and the plaintiff was not guilty of contributory negligence in so varying from it." The defendant duly excepted to this charge, and also reserved separate exceptions to the refusal of the court to give the following charges, requested by it in writing: "(25) The burden is on the plaintiff to establish to your satisfaction by the evidence every material allegation of his complaint, and every material fact upon which his right of recovery depends; and if you believe from the evidence that the plaintiff would not have been injured if he had been on top of the train when it entered the cut, and if the evidence leaves your minds in doubt as to whether or not he was ordered out on top of the train before it entered the cut, you should find for the defendant." "(28) The burden of proof is on the plaintiff to establish by a preponderance of the evidence that he was at his post of duty when he was injured; and if the testimony upon this point is equally balanced, or preponderates in favor of the defendant, your verdict should be for the defendant." From a judgment for plaintiff defendant appeals.

James Weatherley for appellant. *White & Houze* for appellee.

McCLELLAN, J. The objection taken by the demurrer to the first count of the complaint as amended is, that it does not sufficiently specify the defect in defendant's road-way which caused the injury complained of. The averment in this regard is that "the defendant, by its neglect and want of care, allowed its road-way to be and become greatly out of repair, unsafe and dangerous, * * * and by reason thereof the plaintiff, while in said employ [as a brakeman], and in the performance of his duties as such brakeman, was violently struck against a projecting rock," and thereby suffered the injuries on account of which he sues. It would require a good deal of ingenuity to draw from these facts any other conclusion or reach any other result as to the meaning of these averments, than that the defect in the road-way consisted in the projection of a rock approaching so nearly to passing cars as to strike brakemen while in the discharge of their ordinary duties as such. This is that certainty to a common intent required in pleading, and is a sufficiently specific averment of the defect counted on.

2. The negligence laid in the second count of the complaint is twofold. It alleges negligence of the conductor in ordering plaintiff to ascend to the top of the train at the point of the defect, and also the negligence of the defendant itself because of the existence of the defect — the perilous projection of the stone and in effect, that the defect arose from defendant's negligence. It is clear that the negligence of the conductor was dependent upon and resulted from the negligence of the company. But for the defect due to a want of care of the defendant the conductor's act could not have been a negligent one. With the defect the defendant was liable, with or without concurring negligence on the part of the conductor. Without the defect, the conductor could not have been negligent, or had he been, no injury would have resulted. And the allegation of the conductor's negligence concurring with that of the defendant, may be entirely disregarded. It may be granted, indeed, that this count fails to charge any negligence on the part of the conductor for which the company would be responsible, yet, charging as it does actionable negligence and resulting injury against the corporation,

the latter would none the less, by reason of the abortive averments as to the conductor's want of care, still be liable for the injuries suffered through its own negligence. *Railway Co. v. Cummings*, 106 U. S. 700; 1 Sup. Ct. Rep'r, 493; *Booth v. Railway Co.*, 73 N. Y. 38; *Statler v. Railway Co.*, 46 Wis. 497; *Paulmier v. Railroad Co.*, 34 N. J. Law, 157. The first assignment of demurrer to this count is a "speaking" demurrer. It alleges that the only negligence counted on is that of the conductor in giving the order. This, in our opinion, as we have said, is not the case; and the remaining grounds of demurrer, which proceed upon this erroneous interpretation of the count, must fall with it. The objection taken to the count because of the generality of its averments of negligence is untenable. Numerous adjudications of this court support the view that under our system of pleading very general averments, little short, indeed, of mere conclusions of a want of care and consequent injury, leaving out the facts which constitute and go to prove negligence, meet all requirements of the law. *Railroad Co. v. Thompson*, 62 Ala. 494, 500; *Leach v. Bush*, 57 Ala. 145; *Railroad Co. v. Crenshaw*, 65 Ala. 567; *Railroad Co. v. Bees*, 82 Ala. 340; 2 South. Rep'r, 752; *Railroad Co. v. Jones*, 83 Ala. 376; 3 South. Rep'r, 902; *Railway Co. v. Sistrunk*, 85 Ala. 352; 5 South. Rep'r, 69; *Railway Co. v. Lazarus*, 88 Ala. 453; 6 South. Rep'r, 877; *Railroad Co. v. Watson*, 90 Ala. 41; 7 South. Rep'r, 813.

3. The stone which collided with the person of the plaintiff did not project sufficiently from the wall of the cut to touch passing cars, though approached so nearly to them as to greatly endanger employes who should at the moment of passing that point be in the act of ascending or descending to or from the top of the train by means of ladders going up on the outside of cars or caboose. It is common knowledge that this is the usual, if not the universal, method of reaching the roof of freight trains. It may also be said to be common knowledge that employes use this means of ascent and descent while the train is in motion, and generally while it is on its way. The evidence in this case on the part of both plaintiff and defendant's witnesses tends to show that it was a custom on defendant's freight trains generally, as well as this particular one, for brakemen during the intervals when their services were not needed at the brakes, and especially

in inclement weather, such as prevailed on the occasion in question, to pass to and from the caboose over the sides of the cars and along these ladders. The evidence further goes to show that conductors made no objection to this practice, and that it was the custom of the conductor of this train to order a brakeman out to the caboose about the place where plaintiff was ordered out by him on this occasion. In view of the exigencies of the service involving the use of ladders on the sides of cars by employees, and this while the train is in motion, and in view of the custom of resorting to such use, which the evidence here goes to show, we do not hesitate to affirm that it was the part of ordinary care on the part of the defendant—assuming, as the jury might have found, the truth of this testimony—to construct and maintain its roadway so as not only to admit of the safe passage of its cars, but also free from any projection or obstruction which would endanger the persons of employees in the use of these side ladders while the train is proceeding on its way, and that the defendant's failure in this regard rendered it liable to the plaintiff for any damages resulting to him from such failure unless his own negligence proximately contributed thereto. *Kearns v. Railroad Co. (Iowa)*, 24 N. W. Rep'r, 231; *Railroad Co. v. Welch*, 52 Ill. 183; *Railroad Co. v. Russell*, 91 Ill. 298; *Railroad Co. v. Johnson (Ill.)*, 4 N. E. Rep'r, 381; *Clark v. Railroad Co.*, 28 Minn. 128; 9 N. W. Rep'r, 581; *Johnston v. Railroad Co. (Minn.)*, 44 N. W. Rep'r, 884; *Railroad Co. v. Irwin*, 37 Kans. 701; 16 Pac. Rep'r, 146; *Railroad Co. v. Swett*, 45 Ill. 197.

4. But it is insisted that conceding defendant's negligence in the premises, the plaintiff must be held to a knowledge of the defect from which the injury resulted in such sort that his actual ignorance thereof, and consequent exposure to the dangers incident to it, was negligence on his part, which so contributed to the disaster as to deprive him of any right of recovery therefor. We cannot subscribe to this doctrine. Trainmen, having no functions to perform in respect of the construction and maintenance of the roadway, have a right to assume its adaptation and sufficiency in all respects to a safe discharge of their duties in another and distinct branch of the general service, and are not held to a knowledge, which has never in point of fact been imparted to them, of defects and dangerous conditions in the cul-

verts, bridges, tracks, embankments, road-bed, cuts, and tunnels of the railway company, or of the dangerous nature of adjacent structures erected or permitted by the company. The duty of the company to this class of its employes is to provide a road-way in all respects reasonably safe for the running of its trains and the performance of the functions imposed upon them by the exigencies of the service, and they have a right to assume, without inquiry or investigation, that this duty has been discharged. The *onus* of inquiry or investigation is not upon them. If, as matter of fact, they know of unsafe conditions in any of these particulars, and continue in the service after the lapse of a reasonable time for the defects to be remedied or removed, they assume this additional risk, though originally not incident to their employment; but not otherwise. *Myers v. Iron Co. (Mass.)*, 22 N. E. Rep'r, 631; *Scanlon v. Railroad Co. (Mass.)*, 18 N. E. Rep'r, 209; *Pidcock v. Railway Co. (Utah)*, 19 Pac Rep'r, 191; *White v. Worsted Co.*, 144 Mass. 276; 11 N. E. Rep'r, 75; *Hulehan v. Railroad Co. (Wis.)*, 17 N. W. Rep'r, 17; *Soeder v. Railway Co.*, 100 Mo. 678; 13 S. W. Rep'r, 714; *Faren v. Sellers (La.)*, 3 South. Rep'r, 363; *Railroad Co. v. Hall*, 87 Ala. 708; 6 South. Rep'r, 277; *Wuotilla v. Lumber Co.*, 37 Minn. 153; 33 N. W. Rep'r, 551.

5. Certain rules of the company were adduced in evidence in its behalf. They require brakemen to "be constantly on the alert, observe carefully the engine-man's signals, and never, under any circumstances, sleep at their posts;" and that they "must not leave their brakes while the train is in motion, nor take any other position on the train than that assigned them by the conductor." These rules were two of five hundred printed in a book of one hundred and twenty-nine pages, and intended for the regulation of all branches of the business carried on by the defendant. There is no evidence that plaintiff was ever required to acquaint himself with these rules, or did in fact know of them, or what they contained. His own testimony that he had no notice of them is nowhere controverted. These rules can perform no office in the case by way of determining the rights and duties of the plaintiff, except possibly in going to show that plaintiff's services were to be rendered at the brakes on top of the cars when his services were required, while the train was in motion, and this

is fully shown by his own and other uncontroverted testimony; and they might have been excluded from the jury, except, perhaps, for this limited purpose. Having been admitted, they cannot be looked to beyond this, and certainly not for the purpose of imputing negligence to the plaintiff because of conduct on his part at variance with that which they prescribe. *Railroad Co. v. Plunkett*, 2 Amer. & Eng. R. Cas. 127; *Carroll v. Railroad Co. (Ga.)*, 10 S. E. Rep'r, 163; *Railway Co. v. Clem*, 80 Ga. 534, 540, 541; 7 S. E. Rep'r, 84.

6. Leaving out of view so much of these rules as requires that brakemen shall remain at the brakes constantly while the train is in motion, we have, in one aspect of the evidence, the following case: The duties undertaken by the plaintiff in respect of a moving train were to be performed, as occasion might require, on the top of the train. There were intervals, as we have seen, of greater or less duration, depending upon the recurrence of grades, the distances between stations at which stops were to be made, etc., during which, ordinarily, he had no duties to perform at the brakes. It was a custom, as we have before shown, obtaining upon defendant's freight trains generally, and on this one, for brakemen to pass such intervals in the caboose, especially in such weather as prevailed at the time of this occurrence, and to go thence to their posts of duty, as ordered by the conductor, or as occasion required. This usage of the service was known to the conductor in this instance, and was sanctioned and acted on by him in so far as the absence of all objection on his part to the presence of brakemen in the caboose, and all effort on his part to enforce a contrary rule, if such existed and was known to him, and in so far as his dealing with the brakemen in apparent recognition of their right to be there, amounted to sanction and action upon the custom. The plaintiff had been only for a short time in the service, and had never been advised that this usage was violative of any rule of the company or any duty he owed it in the premises. On the occasion in question he had been, in accordance with the usage, for some time in the caboose with, and without objection on the part of, the conductor; and was injured while going thence to his post of duty in obedience to an order of the conductor, which it was his duty to obey. This order was given, the conductor says, in accordance with a rule of his "to

order a man out" at that point to tighten the brakes with reference to a down grade they were approaching, to the end, it seems, that the train might be kept well in hand with a view of stopping it at a station two miles beyond, where this train generally, but not always, had occasion to stop. On these facts — the custom participated in and acted upon by the conductor, the ignorance on the part of the plaintiff of a rule to the contrary, injury received while obeying an order which it was plaintiff's duty to obey, and the necessity for which cannot be ascribed to any misconduct of his — the authorities are full to the proposition that no negligence can be imputed to the plaintiff, even though a rule to the contrary of this usage did exist and was known to the conductor; and some of them go the length of holding that negligence could not be predicated even of plaintiff's knowledge of the rule when considered in connection with the custom of its non-enforcement, such as is disclosed here. Be that as it may, we are clear in the conclusion that the fact of plaintiff's being in the caboose, and the consequent necessity of his exposure to the peril from which the injury resulted in reaching his post of duty, do not import negligence on his part, and would not avail to defeat recovery by him if the jury found the facts to be in accordance with the tendencies of the evidence we have been considering. Authorities *supra*; *Fay v. Railroad Co.* (Minn.), 15 N. W. Rep'r, 241; *Barry v. Railroad Co.*, 98 Mo. 62; 11 S. W. Rep'r, 308; *Railway Co. v. Springsteen*, 41 Kans. 724; 21 Pac. Rep'r, 774; *Durbin v. Navigation Co.* (Or.), 11 Amer. St. Rep. 786, note; 17 Pac. Rep'r, 5; *Railroad Co. v. Kier*, 41 Kans. 661; 21 Pac. Rep'r, 770; *Sprong v. Railroad Co.*, 58 N. Y. 56; *Railroad Co. v. Chasteen*, 88 Ala. 591; 7 South. Rep'r, 94.

7. There is some evidence in the record going to show that, had the plaintiff obeyed the order upon the instant of its delivery, he might have reached the roof before the car came opposite the projecting rock, and thus have escaped the injury. The delay in executing the order, however, seems from the evidence most favorable to the defendant to have been only for a moment or two, and for the purpose of putting on his overcoat and gloves — precautions rendered necessary by the inclemency of the weather. We do not think so brief a delay for so reasonable a purpose can be contorted into a want of diligence on the part of the plaintiff

amounting to contributory negligence. What we have said will suffice to determine against the appellant all the assignments of error, and all the exceptions underlying assignments, which proceed severally on the assumptions (1) that the projection of the stone toward the road-way did not imply negligence on the part of the defendant unless it extended sufficiently to endanger passing cars; (2) that it was incumbent upon the plaintiff to know of the defect which caused the injury, and ignorance on his part was negligence which would defeat his right of action; (3) that plaintiff was guilty of contributory negligence, under all aspects of the evidence, in being on the side of the car when he was stricken by the stone, in that it was his duty to have been at that time on top of the train; and (4) that plaintiff was guilty of contributory negligence in failing to obey the order of the conductor upon the instant of its delivery. Our conclusions in these respects dispose of the exceptions reserved to the giving of charges 1, 2, 3, 5, 6, 9, 10 and 11 at the instance of the plaintiff; and to the action of the court in refusing to give charges 1, 2, 3, 5, 6, 7, 8, 16, 19, 22, 24 and 28, requested by the defendant.

8. The tenth instruction of plaintiff's series, as perhaps one or two others, is faulty, if disassociated with the evidence, in that it would acquit a brakeman of negligence in violating a known rule of the company, made for his guidance, and by the supreme authority in the premises, merely because of the conductor's assenting to such violation. We do not understand this to be the law, though there are cases which go far in that direction. But this infirmity is relieved by referring the charge to the evidence which negatives plaintiff's knowledge of the existence of such rule.

9. Charges 25 and 28, requested by defendant, were well refused upon the further ground that they misplace the burden of proof as to contributory negligence. The *onus* in this regard is in all cases on the defendant, though plaintiff's evidence sometimes relieves from the necessity of discharging it. *Railway Co. v. Bradford*, 86 Ala. 574; 6 South. Rep'r, 90; *Railway Co. v. Calderwood*, 89 Ala. 247; 7 South. Rep'r, 360.

10. There was no evidence in the case that the conductor knew of the defect in the road-way which caused the injury counted on. The negligence charged against him in respect to ordering the plaintiff out at that point must result, if at all, from the imputa-

tion of such knowledge to him as matter of law from the relations he sustained to the defendant on the one hand and the plaintiff on the other. The trial court in its general charge, and in its refusals of several charges requested by the defendant (Nos. 4, 9 and 23), proceeded on the theory that a conductor, while in control of a train out on the road, is in some sort in the shoes of the company, and a vice-principal, to whom the law will impute a knowledge of all facts as to the road-way, etc., which are known or ought to be known to the company itself; and there are not a few well-considered adjudications which so hold. *Railroad Co. v. Stevens*, 20 Ohio, 415; *Railway Co. v. Keary*, 3 Ohio St. 201; *Railroad Co. v. Collins*, 2 Duv. 114; *Ayers v. Railroad Co.*, 84 Va. 679; 5 S. E. Rep'r, 582; *Railroad Co. v. Ross*, 112 U. S. 377; 5 Sup. Ct. Rep'r, 184. But our own cases, and perhaps the weight of authority generally, support the contrary view; at least to the extent of holding that, without regard to grade or rank, and whether the element of personal control enters into the consideration or not, all who are servants of a common master, engaged in the same general business, subject to the same general control, and are paid out of a common fund, are fellow-servants in respect to all acts done in the common service, unless the duty performed by them be such as properly belongs to the master as such, and in which case they take the place of the master; and he is chargeable with their acts as if performed by him personally, with all the knowledge in the premises which the law imputes to him. *McKinney Fel. Serv.*, p. 53, § 23; *Railroad Co. v. Waller*, 48 Ala. 459; *Railroad Co. v. Smith*, 59 Ala. 245; *Tyson v. Railroad Co.*, 61 Ala. 554; *Smoot v. Railroad Co.*, 67 Ala. 13. It may be that some of our cases — that of *Railroad Co. v. Smith*, *supra*, for instance — have gone to the extremest verge of soundness in applying the doctrine of fellow-servants to the exemption of the employer from liability; but we apprehend it would be a more radical departure in the opposite direction from what may be considered the established rule in our jurisprudence, to hold that a conductor in the control of a train is exercising the functions of the master in giving ordinary directions and orders in the management and running of the train, so as to be chargeable with a knowledge of every fact in relation thereto which is known, or of which the law imputes a knowledge, to the master.

11. It seems to us, however, that a decision of that question is not necessary to a correct determination of this appeal. The negligence imputed to the conductor in the second count of the complaint, and which the rulings of the court in certain instructions given and refused allow the jury to impute to him on the theory of his being a vice-principal, is, as we have seen, in its nature secondary and suppletory to that of the defendant itself. If there was a dangerous projection from the wall of the cut, that was the negligence of the defendant, for the injury resulting from which the defendant would be liable, under either count of the complaint, as well without as with concurring negligence of the conductor. If there was no such defect, there could be no negligence either on the part of the defendant directly or on the part of the conductor, and indirectly, through him, on the part of the defendant. If plaintiff knew of the defect, his contributory negligence in attempting to ascend the ladder at that point is not relieved by the fact that the attempt was made in obedience to the conductor's order; and, if the plaintiff was negligent in being in the caboose, his presence there involving a necessity to ascend at that place to the top of the train, that negligence was just the same, in itself and in its results, whether or not the conductor was lacking in due care in ordering him out. Or, in other words, the rights and liabilities of the parties — the cause of action and the defense to it — being precisely the same whether the negligence is imputed to the conductor or not, the rulings of the court in respect to his alleged negligence, whether sound or not, abstractly considered, could have exerted no influence in the premises, and, if error was committed therein, it was without injury, and will not avail to operate a reversal of the judgment. We have discussed all the questions treated of in the argument of appellant's counsel. Several other matters are assigned as error. They have been carefully considered, but we deem it unnecessary to enlarge upon them here. They involve no error. The judgment of the city court is affirmed.*

Railroad companies — accident to employee — obstructions near the track.— Plaintiff's intestate, who had been employed for about two weeks in its yard, where were numerous tracks and constantly moving trains, was killed by coming in contact with a signal-post while ascending the outside ladder of

* Reported in 9 So. Rep'r, 252.

a box-car. The post was four feet from the rail. There was evidence tending to show that the post was too near the cars to be practically safe for operatives, unless aware of the danger. Held that, upon the evidence, the question of defendant's negligence in locating and maintaining the post was for the jury, and also that the court was not warranted in holding, as a matter of law, that the deceased was guilty of contributory negligence in not observing that the post was so near the cars as to be dangerous, and in not appreciating and avoiding the danger. *Johnson v. St. Paul, etc., Ry. Co.*, 48 Minn. 58; 44 N. W. Rep'r, 884. It is the duty of a railway company to place its structures and signal-posts at a reasonably safe distance from its tracks so as not to be dangerous to brakemen and other operatives upon the trains, or to warn them of such dangers, if they exist. The employees are not presumed to assume the risk of such perils, in the absence of notice. *Ibid.*

Where a brake was so defective as to require one letting it off to stoop down and throw his body beyond the line of the cars, and a brakeman was struck, while so doing, by a cattle-guard negligently placed too near the track, of which he had no notice, he may recover for the injury, though, by continuing in the service with knowledge of the defect in the brake, he had assumed the risk as to it. *Missouri Pac. Ry. Co. v. Somers*, 78 Tex. 439; 14 S. W. Rep'r, 779. In such case, if the brakeman continued in the service with knowledge that a number of cattle-guards were too close to the track, he cannot recover, though he did not know the position of the particular one by which he was struck. *Ibid.*

It is negligence to leave a pile of sleepers within eighteen inches of the rails in a switch yard, and, where a brakeman was injured by such a pile of sleepers, while attempting to get on a moving engine, and he was unaware of its existence, the question of his contributory negligence is for the jury. The questions of negligence and contributory negligence having been properly submitted to the jury, a verdict for the plaintiff was sustained. *Babcock v. Old Colony R. Co.*, 150 Mass. 467; 23 N. E. Rep'r, 325.

HARDWICK V. STATE INS. CO.

(Supreme Court of Oregon, April 30, 1901.)

1. FIRE INSURANCE. INSURABLE INTEREST. PLEADING. In an action on an insurance policy the complaint must state that plaintiff had an insurable interest in the premises, failing which a cause of action is not stated.

2. ORAL CONTRACT FOR INSURANCE. Where application is made for insurance, and the premium fixed, and the agent orally agrees that in consideration of the necessary delay in procuring the execution of the policy the insurance shall begin from the date of the application, this is a valid contract of insurance, on which a recovery may be had if the property is destroyed before the policy issues, and not a mere agreement for a contract, to be executed by execution and delivery of the policy.

3. PAYMENT OR TENDER OF PREMIUM. While the insurer, in the absence

of a provision to that effect in the contract, cannot demand the premiums before the policy issues, in an action for breach of the oral contract to insure, the plaintiff must allege and prove payment or tender of the premium before he can recover.

4. AUTHORITY OF AGENT. INSTRUCTIONS. Where there is evidence that plaintiff had no knowledge of any limitations on the agent's authority, and the court has properly instructed on the law of agency, it is not error to leave it to the jury to determine whether the agent had authority to make the oral contract sued on.

APPEAL from circuit court, Yamhill county, R. P. Boise, judge.

This is an action to recover the sum of \$1,000 on a preliminary oral contract of insurance, alleged to have been made by defendant. The complaint, in substance, alleges that on March 6, 1889, defendant executed and delivered to plaintiff its certain policy, by which it agreed to and did insure against loss by fire for the term of three years from that date, the following-described property, to-wit: "On plaintiff's dwelling or residence, \$700; on beds and bedding, while in said house, \$200; on household furniture in said house, the sum of \$100." That at the time of the delivery of the policy the plaintiff paid defendant \$5 in cash, and delivered to it his notes for the balance of premium to be paid on the policy, to-wit, \$25. That afterward some question or dispute arose in regard to the validity of the policy on the grounds that the property was described as a dwelling-house or residence, when in fact it was a hotel or boarding-house. That the dispute was finally settled as follows: The plaintiff agreed, through the agent of defendant at Newburg, Oregon, viz.: N. C. Maris to surrender up the said policy for cancellation, and to make application through said agent for a new policy for the term of one year, and to pay as a premium thereon \$44, in addition to the \$5 already paid, and defendant was to surrender to plaintiff the notes executed by him for cancellation. That, pursuant to said agreement, plaintiff did surrender up said policy, and on the 20th day of July, 1889, made an application for a new one, which was received and agreed to by defendant's agent, with the agreement on his part that the new policy should be executed and delivered as soon as could conveniently be done, and the additional premium of \$44 should be paid on the delivery of the policy. That it was agreed that, inasmuch as it would take some time to execute and return the new

policy from Salem, the principal office of defendant, the insurance should commence on the 20th day of July, 1889, at the hour of 12 o'clock m., and, in case said property should be destroyed by fire before said policy could be delivered to plaintiff, the sum of \$1,000 — the amount thereof — was to be paid as though it had already been delivered, and the policy was to run from said date, instead of the actual day of its execution or delivery. That owing to the sickness of defendant's agent, who received the application, the policy was not written out, executed, or delivered to plaintiff. That on August 18, 1889, the property was destroyed by fire, and defendant refused to execute or deliver the policy as agreed to, and refused to pay for said loss. A general demurrer was filed to the complaint, which, being overruled, defendant answered. The answer admits the execution of the first policy, but denies, *in toto* every thing in the complaint relating to the alleged contract to insure the property by a second or new policy, and affirmatively alleges that Maris had no authority to make any contract or agreement for or on behalf of defendant, which plaintiff well knew. A trial resulted in a verdict and judgment in favor of plaintiff for the sum of \$1,000, from which this appeal is taken.

Geo. H. Burnett and W. W. Thayer for appellant. *Copies Hurley & Allen and James McCain* for respondent.

BRAN, J. (after stating the facts as above). It is contended by appellant that the complaint does not state facts sufficient to constitute a cause of action, because (1) it does not allege that the plaintiff had any insurable interest in the property at the time of the loss; (2) it appears that both parties contemplated an agreement in writing, which was never executed; and (3) it is not alleged that plaintiff either paid or tendered the premium agreed upon for the second policy. The rule is well settled that in fire insurance the assured must have an insurable interest in the property both at the time of the insurance and at the time of the loss. In the case of *Ruse v. Insurance Co.*, 23 N. Y. 516, it was distinctly enunciated that a policy obtained by a party who has no interest in the subject of insurance is a mere wager policy. It was said in that case that, aside from authority, this question would seem easy of solution. Such policies, if valid, not only

afford facilities for a demoralizing system of gambling, but furnish strong temptations to the party interested to bring about the event insured against. In respect to insurances against fire, the obvious temptation presented by a wagering policy to the commission of the crime of arson has generally led the courts to hold such policies void. The contract of insurance is one of indemnity only, and, unless the plaintiff has an insurable interest in the property at the time of the loss, he cannot be injured in any way. *Howard v. Insurance Co.*, 3 Denio, 301; *Murdock v. Insurance Co.*, 2 N. Y. 210. The plaintiff's right to maintain this action depending upon his having an insurable interest in the property at the time of the loss, it follows that his complaint must contain an averment of such interest in order to state a cause of action. *Freeman v. Insurance Co.*, 14 Abb. Pr. 398; *Fowler v. Insurance Co.*, 26 N. Y. 422; *Quarrier v. Insurance Co.*, 10 W. Va. 507. In *Chrisman v. Insurance Co.*, 16 Ore. 283; 18 Pac. Rep'r, 466, it was held by this court that, the plaintiff's interest in the property insured being one of the essential facts upon which his right of recovery depends, in an action founded on a policy against damage by fire such interest must be alleged in the complaint. In that case the question was raised on a motion of the defendant for judgment notwithstanding the verdict, and the court held the objection fatal. The complaint before us fails to allege that plaintiff had any interest in the property destroyed, either at the time the insurance is alleged to have been effected or at the time of the loss. Nor is there any sufficient allegation of an insurable interest at the time the first policy was issued. The allegation that defendant insured his dwelling-house or residence is an insufficient allegation of this interest, and the more obviously so as it is not alleged, even in this way, that the beds and bedding and household furniture in the house, which were also insured, were his. It is not averred, either directly or indirectly, that on July 20, 1889, at the time the contract upon which this action is founded is alleged to have been made, plaintiff had any interest in the property whatever, nor that he had any interest at the time of the loss. Without these allegations the complaint fails to state a cause of action. The decisions, as far as we have been able to ascertain, without exception sustain the position that in cases of this kind the complaint must distinctly allege an insurable inter-

est when the policy is taken out, and also when the property was damaged by fire.

The next objection made to the complaint is that it appears that both parties contemplated an agreement in writing, which was never executed, and hence it is argued there was no contract. We do not understand this action to be based upon an oral contract of insurance, but upon an alleged preliminary oral contract, by which it was agreed that defendant should insure plaintiff upon the property for one year, for the sum and at the rate agreed upon, from the time of making the contract; and that a policy should thereafter be made out by the defendant company, at its home office, to take effect from that time. That such a contract is valid and binding on an insurance company when made within the real or apparent scope of the agent's authority, has been too often decided to leave it an open question. Thus, in *City of Davenport v. Insurance Co.*, 17 Iowa, 276, an agreement of insurance was entered into between the parties, by their agents, on the 20th of March, the insurance to date from noon of that day, the policy to be executed and delivered the next day. On the night of the same day the property was destroyed by fire. On the morning of the 21st the policy was executed and delivered and received in perfect accord with the agreement, both parties being ignorant of the fire. Held, that the company was liable for the loss.

So, in *Audubon v. Insurance Co.*, 27 N. Y. 216, it appeared that plaintiffs sent certain of their engravings to a book-binder, on Saturday, to be bound, and in the afternoon of the same day sent their agent to defendant's office to effect an insurance on them, at a valuation of \$1,500, for one month. It appeared that on January 10, preceding, the defendants by an ordinary policy, had insured plaintiff on certain sets of the same work, at the same bindery, for one month, at a valuation of \$1,000, the premium being at the rate of 30 cents per \$100. That, when plaintiff's agent applied to defendant's secretary for the insurance, and asked him if defendant would insure the property, the secretary replied, "We will;" and agreed that the policy would be sent to plaintiffs on the following Monday. The engravings were burned on the following Sunday, and defendant refused to issue or deliver the policy. Held, that the insurance took effect from the date of the

oral application, and the company was liable for the loss, notwithstanding no definite agreement was made as to the premium. So, in *Fish v. Cottenet*, 44 N. Y. 538, it appeared that on October 20, 1864, the plaintiff applied to Wilber, as agent of defendant, to insure him upon brewery buildings against loss and damage by fire, to the amount of \$5,000; and it was there verbally agreed between the plaintiff and Wilber, who assumed to act in behalf of the company, that the company from that time forth, and for the space of one year therefrom, would insure the plaintiff upon the brewery buildings against loss and damage by fire, the sum of \$5,000, and would deliver its policy of insurance accordingly, and that, when requested, plaintiff would pay the premium. The plaintiff after this frequently called upon Wilber to get the policy, and upon each and every occasion Wilber said the policy had not yet come, but that it would come; that he need not give himself any trouble about it; and that he was just as much insured as if he had the policy. The plaintiff acted in good faith, and relied upon the agreements and statements of Wilber. On January 24, 1865, the buildings were destroyed by fire. Held, that defendants were liable for the loss, although no policy of insurance upon the buildings was ever delivered by the company to the plaintiff; nor was the premium ever demanded or paid; nor did Wilber ever communicate to the company the application of the plaintiff for insurance, nor the agreement made with him. In *Angell v. Insurance Co.*, 59 N. Y. 171, the plaintiff entered into an agreement with the agent of the defendant company to insure his building for \$1,000 for three years for the sum of \$30, and to make out and deliver a policy, the premium to be paid when the policy was delivered. The agent did not make out the policy, and, the premises having been destroyed by fire, the plaintiff tendered the premium, and demanded the policy. The defendant refused to execute or deliver the policy, and an action was brought to recover for the breach of the contract to insure, and the court held the company liable. Grover, J., in delivering the opinion of the court, said: "The counsel for the appellant is mistaken in supposing the action based upon an oral contract of insurance for three years. There was not sufficient evidence to show that Carpenter was authorized to make such a contract for the defendant. It was alleged in the complaint, and the evidence tended to prove,

that a preliminary contract was made, by which it was agreed that the defendant should insure the plaintiff upon the property against damage by fire for a sum and at a rate agreed upon, for the term of three years from the time of making the contract, and that a policy should shortly thereafter be made out, to take effect from that time." Without stopping to quote from other authorities upon this question, it is safe to say that in all cases where parol contracts of this kind are not prohibited by statute, a parol contract of insurance is valid and binding, as well as parol contracts to effect an insurance by issuing policies; and the latter class of contracts will be enforced by compelling specific performance by the company, or in an action for the breach of the agreement, in either of which a recovery for a loss of the property agreed to be insured will be awarded the plaintiff. *Ellis v. Insurance Co.*, 50 N. Y. 402; *Angell v. Insurance Co.*, 59 N. Y. 171; *May Ins.*, § 565. In such case the risk attaches from the date of the application, or from the time designated as the commencement of the risk; and the only effect that can be given to the additional promise to execute a written policy is that, upon the tender of such a policy, and a demand of the premium, the oral contract should cease. 1 *Wood Ins.*, § 4; *Kelly v. Insurance Co.*, 10 Bosw. 82; *Insurance Co. v. Shaw*, 94 U. S. 574; *Sanborn v. Insurance Co.*, 16 Gray, 448; *Baptist Church v. Insurance Co.*, 19 N. Y. 305; *King v. Insurance Co.*, 58 Wis. 508; 17 N. W. Rep'r, 297; *Putnam v. Insurance Co.*, 128 Mass. 324. That contracts of insurance are not usually made in this way is no evidence that they cannot be so made. As was said by Comstock, J., in *Baptist Church v. Insurance Co.*, supra: "There is nothing in the nature of insurance which requires written evidence of the contract. To deny, therefore, that parol agreements to insure are valid, would be simply to affirm the incapacity of parties to contract where no such incapacity exists, according to any known rule of reason or of law." It seems now well settled that, if an application is made for insurance, whether in writing or by parol, and the risk is accepted, the contract is complete, and the risk attaches from the date of the application or from the time designated as the commencement of the risk, and the company would be liable for loss if it occurred after that and before the contract was consummated by the formal execution and delivery of the policy. 4

Field Lawy. Briefs, 245, and cases there cited. 1 Wood Ins., § 20.

The next objection to the complaint is that it is not alleged that plaintiff paid or tendered the premium agreed to be paid, and it is contended that the payment or tender of the premium by him is a condition precedent to his right to recover. From an examination of the cases heretofore cited, when actions have been brought and sustained on preliminary parol contracts to insure, it will be seen that in nearly all of them the premium was not paid or tendered until after the loss, when the premium was tendered, and the policy demanded. It is not considered essential, unless expressly required by the agent, that the premium should be paid at the time the oral contract is entered into, in order to constitute a valid contract to insure. "The rule is," says Mr. Wood, "that in case of a mere oral contract of insurance, supported by a sufficient consideration, which is to take effect forthwith, although it may be entered into contemporaneously with an agreement by the insurer to deliver, and the assured to accept, subsequently, as a substitute therefor, a written policy by the former, in the form usually adopted by them, becomes binding, and remains in force until the delivery or tender of such policy. Until then, the condition usually inserted in such policies, requiring prepayment of the premium to make them binding, unless expressly adopted by the parties in such oral contract, forms no part of the insurance between them. A mere demand of the premium, without insisting upon it, or tendering a valid policy, does not terminate the oral insurance." 1 Wood Ins., § 30.

In a leading case upon this question a defective policy was issued and delivered to plaintiff after a loss had occurred and the premium paid. The plaintiff, admitting that the policy was invalid, brought an action upon the oral contract. The defendant denied its liability under the oral contract because the premium was not paid until after the loss, when the policy required it to be paid before the risk attached. The action was upheld, and a recovery permitted under the oral contract. Robertson, J., speaking on this question, said: "The defendants at the time [of the loss] could have sued him [plaintiff] for the premium, and recovered. There was no reason why they should not be equally held for the insurance, unless, upon a tender of the policy and a

peremptory demand, by them for the premium, the plaintiff had refused to pay it. * * * It is clear that for such premium the defendants intended to have taken the risk. They had a right to stop the credit for the premium and the oral contract by presenting a perfect policy and demanding the former. They did not exercise the right, and, when a loss occurred, they seek to evade it." *Kelly v. Insurance Co.*, 10 Bosw. 82. See, also, opinion of Denio, C. J., in *Audubon v. Insurance Co.*, supra, in which he says: "It is true that in this case the consideration was not paid, but the owners of the property were ready to pay it when the policy should be delivered. In the mean time it was a debt against the owners, for which credit was given until delivery of the policy." The current of decisions seems to be that the premium is not payable, unless expressly made so by the contract, until the policy issues; and then the assured must accept the policy and pay the premium. *City of Davenport v. Insurance Co.*, supra; *Hamilton v. Insurance Co.*, 5 Penn. St. 339; *Insurance Co. v. Robinson*, 25 Ind. 536. It follows, therefore, that plaintiff was not compelled to pay or tender the premium before the loss, in order to recover; but, since this is an action to recover damages for the breach of an alleged oral contract, by which it was agreed that defendant should insure plaintiff's property from the time of making the contract, and that a policy should thereafter be issued by defendant, to take effect from that time, it necessarily follows that before plaintiff can recover for such breach, he must allege and prove performance, or an offer of performance, of the contract on his part. The payment of the premium was by the contract a condition precedent to his right to the policy. There could be no breach of the contract on the part of defendant until payment or tender of the premium by plaintiff. The delivery of the policy and payment of the premium were to be concurrent acts, and neither party could insist upon performance by the other without performance or an offer to perform on his part. The defendant had no right to demand the premium until it tendered the policy, nor the plaintiff the policy until he paid or tendered the premium; and hence there could be no breach of the contract by defendant until such payment or tender. The complaint fails to allege the tender or payment of the premium by plaintiff, or any facts which will excuse a tender; and hence does

not show a breach of the contract by the defendant, or state a cause of action. From the views already expressed the case must be reversed, but the probability of another trial renders it important that we examine the other assignments of error.

In the ruling of the court sustaining the motion to strike out that portion of the answer alleging that the action was not commenced within six months after loss, and refusing to give the instruction asked by defendant, to the same effect, there was no error. This action is not based upon the terms of any policy, but upon the breach of a contract. Although the plaintiff testified that the policy to be issued was to be in terms the same as the former one, except as to length of time and amount of premium, defendant refused to issue or deliver the policy according to contract, and hence this action. Having failed to issue the policy, it can claim no exemption from liability on account of any provisions the policy might or would have contained had it been issued.

The other errors alleged are in giving and refusing certain instructions. In order to a correct understanding of the questions involved, a brief reference to some of the facts is necessary. About July 1, 1889, plaintiff ascertained from agents of other insurance companies that there was some doubt about the validity of the policy issued by defendant in March, because the building was described as a dwelling, when in fact it was a hotel or boarding-house. He applied to Maris, defendant's agent at Newberg, for information about the matter, and was told that the policy was not valid, and the company would not continue the risk. He then told Maris that he would like to cancel the policy, and get his notes back, and Maris said he would write to the company about the matter. Maris was defendant's agent at Newberg, with an office and sign out as agent of State Insurance Company. The evidence tended to show that he was engaged in soliciting insurance, delivering policies, taking applications for insurance, collecting and remitting money, and doing other business in relation to insurance, and generally holding himself out as the agent of defendant. That by his commission of appointment he was given authority to solicit and receive applications for insurance on such property in such amounts and at such rates as are permitted by the rules and instructions furnished by the company, and not otherwise, and to receive and transmit the premium therefor;"

but there was no evidence that plaintiff had any knowledge of this commission, or of any limitation on Maris' authority, except that he did not write policies, but he supposed Maris was the general agent of defendant. In accordance with his understanding with plaintiff, Maris wrote to defendant, inclosing a diagram of the property, and in reply received a letter giving the terms upon which the old policy would be canceled, and also the terms upon which a new one would issue. On July 20, Maris called upon plaintiff, and showed him the letter, and plaintiff agreed to cancel the old policy, and take out a new one, on the terms stated in the letter, and did surrender up the old policy to Maris.

The details of the contract or agreement between Maris and plaintiff were questions of fact for the jury, and are not necessary for us to consider, further than stated. On the trial in the court below the defendant denied the authority of Maris to make the contract sued on, and this was one of the principal issues in the case. On this question the court instructed the jury that, "as to whether or not Maris made the contract sued on, and whether he had authority to make it, if made, are questions of fact for the jury to determine from the evidence." Considered by itself, this instruction is not strictly correct. The scope of an agent's authority is not wholly a question of fact, but one of law and fact. 2 Wood Ins., § 870. But this instruction must be construed in connection with the entire charge of the court, and, viewed in that connection, we think it is unobjectionable. The jury were instructed fully, and, in the absence of objection, we must assume correctly, as to the law of agency applicable to the facts of this case. The detached portion of the charge objected to was in effect saying to the jury that, "whether Maris had authority under the law as given to you, to make the contract sued on, if made at all, is a question of fact for you to determine from the evidence," and in this we think there was no error. The defendant requested the court to instruct the jury: "If Mr. Maris, as agent of the defendant, only had authority to receive applications for insurance, and transmit them to the defendant at its home office, and collect the premium, and was the medium through which policies were delivered to parties insured, the plaintiff would not, upon these facts, be justified in treating him as having authority to make contracts of insurance binding upon the company, because the

very fact that the application is required to be made and forwarded to the company is notice that the plaintiff reserves the right to judge and determine for itself whether or not the risk shall be taken." This request may be conceded to be good law, but, as applied to the facts of this case, we think it was properly refused. As we read the record, plaintiff claims that he had no knowledge of the limitation on the powers of Maris, nor that his duties were only to receive applications for insurance, and forward them to the home office. It is true plaintiff knew, perhaps, that Maris did not write policies; but that he knew the reason does not appear. Maris was not the agent through whom the first policy was secured, and, therefore, plaintiff obtained no information as to Maris' authority in that way. Maris was acting as defendant's agent. To him plaintiff applied for information concerning the validity of the first policy. Maris wrote to the company stating the facts, and received a reply giving the terms upon which it would cancel the old policy and issue the new one. Armed with this letter Maris sought plaintiff, and he agreed to accept the terms, and surrender up the old policy; and, as he claims, Maris made the contract sued upon. The terms were those proposed by the company itself, and it would no doubt have issued the policy to take effect from the date of application if the illness of Maris had not prevented him from making out and forwarding the formal application according to understanding with plaintiff. In the absence of notice to plaintiff of any limitation in Maris' authority, or of facts amounting to notice, we think it was a question of fact for the jury, under proper instructions from the court, as to whether plaintiff had a right to assume that Maris had authority to make the contract sued on, if he did make it; and the request under consideration entirely withdrew this question from the jury. 2 Wood Ins., § 423; Putnam v. Insurance Co., 123 Mass. 324; Palm v. Insurance Co., 20 Ohio, 537; Cooke v. Insurance Co., 7 Daly, 555; Ellis v. Insurance Co., 50 N. Y. 402. Where insurance companies deal with the community through a local agency, persons having transactions with the company are entitled to assume, in the absence of knowledge as to the agent's authority, that the acts and declarations of the agent are as valid as if they proceeded directly from the company. 2 Amer. Lead. Cas. 922; Insurance Co. v. Wilkinson, 13 Wall. 222. And a

person who is clothed with power to act for them at all is treated as clothed with authority to bind them as to all matters within the scope of his real or apparent authority, and persons dealing with him in that capacity are not bound to go beyond the apparent authority conferred upon him, and inquire whether in fact he is authorized to do a particular act. It is enough if the act is within the scope of his apparent authority. 2 Wood Ins., § 408, and authorities there cited. In *Insurance Co. v. Wilkinson*, supra, Mr. Justice Miller, in speaking on this question, uses the following appropriate and very apt language: "The agents are stimulated by letters and instructions to activity in procuring contracts; and the party who is in this manner induced to take out a policy rarely sees or knows any thing about the company or its officers by whom it is issued, but looks to and relies upon the agent who persuaded him to effect insurance as the full and complete representative of the company, in all that is said and done in making the contract. Has he not a right to so regard him? It is quite true that the reports of judicial decisions are filled with the efforts of these companies, by their counsel, to establish the doctrine that they can do all this, and yet limit their responsibility for the acts of these agents to the simple receipt of the premium and delivery of the policy. This proposition is not without support in some of the earlier decisions on the subject; and, at a time when insurance companies waited for parties to come to them seeking assurance, or to forward applications on their own motion, the doctrine had a reasonable foundation to rest upon. But to apply such a doctrine in its full force to the system of selling policies through agents, which we have described, would be a snare and a delusion, leading, as it has done in numerous instances, to the grossest frauds, of which the insurance companies receive the benefits, and the parties supposing themselves to be insured are the victims."

This rule proceeds upon the theory that, if any party is to suffer by reason of the wrong-doing of such agent, it should be the company who clothed him with a patent authority, and for whom he was acting, rather than the assured, who acted in good faith, and innocently became a party to the contract. The public regard such persons as agents, clothed with authority to make contracts of insurance; and the companies certainly are aware of that fact. They must be held responsible for the acts of such agents

within the scope of the business intrusted to them, and cannot limit their liability by any secret limitations or instructions, not known to the party dealing with the agents. *City of Davenport v. Insurance Co.*, 17 Iowa, 276; *Insurance Co. v. McGowan*, 18 Kans. 300; *Ellis v. Insurance Co.*, 50 N. Y. 402; *Palm v. Insurance Co.*, 20 Ohio, 537. An insurance company which clothes a person with authority to hold himself out to the community as its local agent with authority to effect insurance is bound by the acts of the agent within the apparent scope of his authority. This authority need not be expressed, but may be implied from circumstances, and may thus exist as to third parties, although not as between the agent and the company. As said by Mr. Justice Miller in *Insurance Co. v. Wilkinson*, *supra*: "The powers of the agent are, *prima facie*, co-extensive with the business intrusted to him, and will not be narrowed by limitations not communicated to the person with whom he deals. An insurance company establishing a local agency must be held responsible to the parties with whom they transact business for the acts and declarations of the agent within the scope of his employment, as if they proceeded from the principal." The decided tendency of the recent decisions, and, we think, properly, is to hold the insurer bound by the acts and conduct of the local agent whenever it can be done consistently with the rules of law. Such local agent is expected, both by the company and the assured, to receive applications, to examine the premises, determine the character of the risk, agree upon the amount to be insured and premium, and in fact to represent the company in the matter of effecting the insurance. He is the only person, from the nature of the case, who can be presumed to have information necessary to act for the company, and is the only person with whom the party applying has any thing to do. His principal is usually remotely located. Its patrons in his vicinity naturally look to him for direction, generally, as to the insurance obtained through him; and persons insured in his company, with few if any exceptions, would, in the absence of notice that his powers were limited, regard his statements or contract as to any matter relative to such insurance as authoritative and binding upon the company. They look to the agent through whom they have obtained insurance as the complete representative of the company in every thing connected with that insurance. If they

did not have a right to so consider the authority of the local agent, it would undoubtedly create distrust, and cripple the business, and contracts of insurance would in many instances prove a snare and a delusion and a fraud of the grossest kind, of which the supposed assured would be the victim. The fact that the agent may not have authority to issue the policy, which is simply the written evidence of the contract, does not of itself prevent him from making a valid preliminary oral contract to insure; and it is said in such cases the courts will take judicial notice of the usage to make such contracts date from the application. *Palm v. Insurance Co.*, 20 Ohio, 529; *Fish v. Cottenet*, 44 N. Y. 538; *Ellis v. Insurance Co.*, 50 N. Y. 402; *Post v. Insurance Co.*, 43 Barb. 361; *Sanborn v. Insurance Co.*, 16 Gray, 448. Where the authority of an agent is limited, and the person with whom he contracts has notice of such limitation, of course the principal is not bound beyond the agent's authority; but whether plaintiff in this case had notice of the limitation on Maris' authority was a question of fact for the jury. The other instruction, the refusal of which is assigned as error, was, we think, substantially given by the court in paragraph 6. The judgment will be reversed, and a new trial ordered.*

Fire insurance — oral contract of insurance.— An insurance agent's commission certified that he had full power to receive proposals for insurance, fix rates of premiums, and receive money, subject to the company's rules and regulations, and such instructions as might be given from time to time by its general agent. The lessee of a hotel made a verbal agreement of insurance with the agent, who stated that a formal application was not necessary. The company, prior thereto, had written policies on the building, and its general manager had written the agent that he would give his attention to any insurance required on the hotel and contents, and upon another occasion that he would take the whole line, and place it in such companies as was specially desired. Held, that this was sufficient to support a finding that the agent was authorized to make the contract, and the company was held liable for a loss which occurred before any policy was issued. *Harron v. City of London Fire Ins. Co.*, 88 Cal. 16; 25 Pac. Rep'r, 983. The validity of oral contracts of insurance is sustained by the following authorities: *Mobile Marine Dock, etc., Ins. Co. v. McMillan*, 81 Ala. 711; *McCulloch v. Eagle Ins. Co.*, 1 Pick. 278; *Sanborn v. Fireman's Ins. Co.*, 16 Gray, 448; *Hartford Fire Ins. Co. v. Farrish*, 78 Ill. 166; *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345; *Westchester Fire Ins. Co. v. Earle*, 83 Mich. 148; *Northrup v. Miss. Valley Ins. Co.*, 47 Mo. 435; *Franklin Fire Ins. Co. v. Taylor*, 52 Miss. 441; *Relief Fire Ins. Co. v. Shaw*, 94 U. S. 574.

* Reported in 26 Pac. Rep'r, 840; 20 Ore. 547.

OLDENBERG ET AL. V. NEW YORK CENT. & H. R. R. Co.

(Court of Appeals of New York, Second Division, March 10, 1891.)

1. RAILROAD COMPANIES. ACCIDENTS AT CROSSINGS. CONTRIBUTORY NEGLIGENCE. Plaintiff's intestate was killed by an engine backing up against him as he was attempting to cross the track on a public street. There were five tracks, and he was unacquainted with the locality. He did not start to cross until the gateman had raised the gates, and he could not see the engine, on account of intervening cars, until he was only five feet from it. The place of safety between the tracks was only three feet wide. The intestate had his head down, looking at the sidewalk, which was rough, and did not see the engine. Held, that the question of contributory negligence was for the jury.

APPEAL from a judgment of the general term of the superior court of Buffalo, affirming a judgment entered upon the verdict of a jury, and also affirming an order denying a motion for a new trial. Action to recover damages from the defendant for causing the death of plaintiffs' intestate by negligently running over him as he was walking upon a public street at a point where it crossed a railroad track at grade. No question was raised as to the negligence of the defendant, and the sole controversy upon this appeal is in relation to the alleged contributory negligence of the deceased.

James F. Gluck for appellant. *Isaac S. Signor* for respondent.

VANN, J. (after stating the facts as above). Chicago street, in the city of Buffalo, runs substantially north and south, and is crossed at right angles by three railroad tracks operated by the defendant. The distance from the north rail of the north track to the south rail of the south track is twenty-eight feet and five inches. Each of the tracks is four feet eight and one-half inches between the rails. It is seven feet three and one-half inches from the south rail of the north track to the north rail of the middle track and seven feet from the south rail of the middle track to the north rail of the south track. There are safety gates at this crossing, fifty-one feet and six inches apart, operated by a gateman stationed at the south-west corner. On each side of the street is a sidewalk substantially six feet wide, and the distance from one sidewalk to the other is about fifty feet. The west sidewalk between the gates is also crossed by two switch tracks, one north

and the other south of the main tracks already mentioned, and extending about half-way across the street before they are merged in the outer main tracks. On the 15th of September, 1888, at about 1 o'clock in the afternoon, Charles Oldenberg, the plaintiffs' intestate, a man of mature years, was walking south on the west side of Chicago street, and as he approached this crossing, the gates were down to enable a passenger train of four or five coaches to pass toward the west on the north track. He stopped until the last car had crossed, and as the gates began to rise he went on. At the same time a team started to cross from the south, the gateman having shouted to it to go ahead. It went very slowly. Until Oldenberg had passed over the middle track he could see nothing south thereof, and west of the sidewalk on which he was walking, because his view in that direction was cut off by fifteen passenger coaches standing on the middle track, and extending westward for a block and a half. The most easterly of these coaches reached half-way across the west sidewalk, and projected two feet beyond the rails of the track upon either side. Thus his view to the south-west was shut off until he had passed by the end of the coach, which would place him at a point two feet south of the middle track. Until he reached this point, which was only five feet from the south track he could see substantially no part of that track west of the sidewalk. As he reached this point, walking rather fast, and having no knowledge of the locality, a locomotive, with a tender attached, was almost upon him, backing eastwardly on the south track at the rate of ten miles an hour. The bell was probably ringing, but the passenger train was not out of hearing, and there was some confusion of sounds. Had he stopped and looked toward the west at the instant that he reached said point, he could have seen the danger in time to avoid it, but less than two steps forward brought him in contact with the cross-beam of the tender, which projected about two feet beyond the rails of the track on each side, and he was thrown under the wheels and killed. He did not look toward the west at the critical moment when he could have seen the engine, but went with his head down, as if looking at the sidewalk, which was rough, and the planks composing it very uneven. The gateman had begun to lower the south gate, and it was half-way down when the accident happened. As he was lowering the gate,

he shouted to the deceased, who paid no attention, and whether he heard or not was a question of fact, under the circumstances. The space between the middle and south tracks, where Oldenberg could have stood without danger from the passenger coach behind or the advancing tender in front, was only three feet long. In order to reverse this judgment, it is necessary to hold that, notwithstanding the peculiar facts surrounding him, he was bound, as matter of law, while passing over this distance of three feet, to look to the west so as to see the engine, or else to look in front of him, and up high enough to see the gate as it began to fall. We do not think that the law required this, but agree with the courts below in holding that the question of contributory negligence, under all the circumstances, was one of fact for the jury, and not of law for the court.

The deceased did not enter upon the crossing until the flagman had not only given a signal of safety by raising the gates, but had also shouted to the team in waiting to go ahead. Whether he heard the shouts or not, the open gate was virtually an invitation to him to proceed, and the team, crossing slowly, was in plain sight, and would naturally add to his confidence. As said by this court in a recent case: "The raising of the gate was a substantial assurance to him of safety, just as significant as if the gateman had beckoned to him or invited him to come on, and that any prudent man would not be influenced by it is against all human experience." *Glushing v. Sharp*, 96 N. Y. 676. Or, as laid down in a still later case: "The open gate was an affirmative and explicit declaration and representation that neither train nor locomotive was approaching with intent to pass." *Palmer v. Railroad Co.*, 112 N. Y. 234, 241; 19 N. E. Rep'r, 678. While the deceased had the right to rely to a certain extent upon the assurance thus given by the defendant that it was safe for him to go on, it was still his duty to be on the lookout for danger, and to exercise the same care that a man of ordinary prudence would have exercised under the same circumstances. The degree of care depended upon his knowledge of the situation, or upon those facts that he would have discovered by the use of ordinary vigilance. It does not appear that he had ever seen this crossing before, or that he knew any thing about it, except what he observed on the occasion when he met his death. In this respect, as well as by

the implied invitation to proceed arising from the use of safety gates, this case is easily distinguished from those relied upon by the defendant. *Woodward v. Railroad Co.*, 106 N. Y. 369; 13 N. E. Rep'r, 424; *Young v. Railroad Co.*, 107 N. Y. 500; 14 N. E. Rep'r, 434.

It is claimed that he should have looked to the right, so as to see the approaching engine, and in front, so as to see the descending gate; but can it be held, as matter of law, that he had time for this, and also to use due care in other respects? According to the evidence, not more than nine or ten seconds elapsed after the passenger train had gone by on the north track before the engine came down on the south track. During this short period he proceeded to cross; passed over two tracks; reached the third, where he could not safely stop, because at any time the passenger coaches standing there might back down upon him; went on two feet further, where the strip three feet long would have afforded safety if he had known it; took one step more, and, in the language of a witness, "just as he gave the second step he was whirled around and pitched headforemost." Can the court say that, knowing nothing of his surroundings, he was bound to look in any particular direction, while, hearing no bell and conscious of no danger, he took one step and a part of another? How long is a rapid walker in taking a single step? How much time was there for reflection or action? Even if he had stopped walking, how could he have decided on the instant just where it was safe for him to stand between the tracks? It was his privilege to look down upon the rough walk, so as to avoid danger there, and the evidence warranted the jury in finding that he did so. It was his duty to look to the east, where there was no obstruction in sight; but, while he was bound to use his eyes, we cannot say that he was bound to use them in a particular manner, at a particular instant of time. We think that it was for the jury to take into consideration all the circumstances, and decide whether he exercised such care as could reasonably be required of one in his situation and with his knowledge. *Greany v. Railroad Co.*, 101 N. Y. 419; 5 N. E. Rep'r, 425; *Sherry v. Railroad Co.*, 104 N. Y. 652, 657; 10 N. E. Rep'r, 128. As this is the only question, properly raised by exception, that has been discussed by the learned counsel for the defendant, the judgment should be affirmed, with costs. All concur.*

* Reported in 26 N. E. Rep'r, 1021.

ACCIDENTS AT RAILROAD CROSSINGS.

1. **Contributory negligence — duty to look and listen.** — The following cases support the general proposition that it is the duty of a person about to cross a railroad track, to exercise every reasonable precaution in looking and listening for approaching trains, and that a failure to do so is contributory negligence which will defeat a recovery: *Louisville, etc., R. Co. v. Stommel*, 126 Ind. 35; 25 N. E. Rep'r, 863; *Cincinnati, etc., R. Co. v. Howard*, 124 Ind. 280; 24 N. E. Rep'r, 892; *Leak v. Georgia Pac. Ry. Co.*, 90 Ala. 161; 8 So. Rep'r, 245; *Brown v. Texas, etc., Ry. Co.*, 42 La. Ann. 350; 7 So. Rep'r, 682; *Apsey v. Detroit, etc., R. Co.*, 83 Mich. 432; 47 N. W. Rep'r, 818; *Rodrian v. New York, etc., R. Co.*, 125 N. Y. 526; 26 N. E. Rep'r, 741; *Nash v. New York Central, etc., R. Co.*, 125 N. Y. 715; 26 N. E. Rep'r, 266; *Tucker v. New York Central, etc., R. Co.*, 124 N. Y. 806; 26 N. E. Rep'r, 916; *Mehegan v. New York Central, etc., R. Co.*, 125 N. Y. 768; 26 N. E. Rep'r, 996; *Ellis v. Lake Shore, etc., R. Co.*, 188 Penn. St. 506; 21 Atl. Rep'r, 140. If the view is obstructed, or if the sound of an approaching train is liable to be obscured by the wind or other noise, or if the crossing is otherwise dangerous, the precautions of the traveler should be correspondingly increased. *Cincinnati, etc., R. Co. v. Howard*, 124 Ind. 280; 24 N. E. Rep'r, 892; *Louisville, etc., R. Co. v. Stommel*, 126 Ind. 35; 25 N. E. Rep'r, 863; *Ellis v. Lake Shore, etc., R. Co.*, 188 Penn. St. 506; 21 Atl. Rep'r, 140.

2. **If plaintiff is driving, diligence may require that he should stop his wagon and listen.** — Plaintiff drove a team attached to a lumber wagon toward a railroad crossing, with his back to an approaching train. Intervening objects obscured a view of the track so that he could not see the train until within a few feet of the crossing, and then only when it was a short distance from the crossing. A mill in the vicinity made considerable noise, and the wind was blowing in a direction to take the sound of a whistle from plaintiff. On reaching the crossing, the team hesitated, but plaintiff urged them across, and was struck by the train. He was thoroughly familiar with the crossing, and knew that the train was due. Held, that it was not sufficient that plaintiff looked and listened for the train as he drove along, but he should have stopped his wagon and listened. *Brady v. Toledo, etc., R. Co.*, 81 Mich. 616; 45 N. W. Rep'r, 1110. See, also, *Ellis v. Lake Shore, etc., R. Co.*, 188 Penn. St. 506; 21 Atl. Rep'r, 140.

3. **Where there are several tracks, duty to look before crossing each track.** — Plaintiff's husband was killed by a train while attempting to cross a railroad on a public street. It was in the evening, but there was nothing to obstruct the view. Plaintiff walked about three feet behind her husband. She testified that when they reached the first track she could neither see nor hear a train. The accident occurred on the fourth track. There was no evidence that either she or her husband looked or listened after crossing the first track. Held, that plaintiff could not recover, not having shown that her husband was free from contributory negligence. *Wiwrowski v. Lake Shore, etc., R. Co.*, 124 N. Y. 420; 26 N. E. Rep'r, 1023.

4. **When rule requiring plaintiff to look and listen does not apply.** — Where plaintiff, who was unacquainted in the neighborhood, was crossing the defendant's tracks in the evening in a thickly-settled part of a city, and the

sidewalk was continuous, and there was no flagman or light, and the view was obstructed, it was held that the circumstances of the case make it an exception to the general rule requiring persons approaching a railroad crossing to look and listen before attempting to cross. *Winchell v. Abbott*, 77 Wis. 871; 46 N. W. Rep'r, 665.

5. Whether plaintiff must continue to look and listen — unlawful speed of train. — In an action for injuries from a railway train while driving over a crossing, plaintiff testified that he looked for the train when between fifty and sixty feet from the crossing, and there was evidence that he could then have seen the train, had it been within a certain distance of the crossing. If the train had been that distance away, and running on statutory time, plaintiff would have passed beyond the crossing before the train reached it. Held, that it could not be said, as matter of law, that plaintiff was negligent in failing to look again for the train on approaching the track, though he could then have seen a greater distance in the direction of the train, and might have stopped his team instantly, as he had a right to assume that trains were moving at lawful speed. *Piper v. Chicago, etc., R. Co.*, 77 Wis. 247; 46 N. W. Rep'r, 165.

6. After waiting for train to pass, duty to look and listen before proceeding upon another track. — Where deceased waited for the passage of a train on one of defendant's tracks, stepped on to an adjoining track, and was run over by a train which he could have seen had he stopped to look, he was guilty of contributory negligence. *Daniels v. Staten Island Rapid Transit R. Co.*, 125 N. Y. 407; 26 N. E. Rep'r, 466. Where one residing in the neighborhood of a railroad, the second track of which was used for west-bound freight, and the third track for east-bound passenger trains, crosses the second track at a permissive crossing immediately after a freight has passed, and is run into by an east-bound passenger train as he steps upon the third track, he is guilty of contributory negligence which will prevent recovery. *Kraus v. Pennsylvania R. Co.*, 139 Penn St. 373; 20 Atl. Rep'r, 998. Under somewhat similar facts the question of contributory negligence was held to be for the jury in *Bare v. Pennsylvania R. Co.*, 135 Penn. St. 95; 19 Atl. Rep'r, 935. See, also, *Dickson v. Mo. Pac. Ry. Co.*, 104 Mo. 491; 16 S. W. Rep'r, 881.

FITZGERALD ET AL. V. GRAND TRUNK R. CO.

(Supreme Court of Vermont, General Term, May 5, 1891.)

1. RAILROAD COMPANIES. SUIT TO RECOVER REBATES. DISCRIMINATION. A contract by which a railroad company, before the passage of the interstate Commerce act, discriminates by agreeing to allow a certain shipper a rebate on freight charges, is not valid and enforceable at common law, and is not such a contract as could be impaired by the interstate commerce act prohibiting such discrimination.

2. INTERSTATE COMMERCE. Where parties contract to engage in interstate commerce, they do so subject to the right of congress to afterward pass laws regulating such commerce.

EXCEPTIONS from Essex county court, Veazey, judge. *Assumpsit* by George H. Fitzgerald & Co., against the Grand Trunk Railroad Company, to recover a rebate of freight. Judgment for defendant, and plaintiffs except.

L. H. Thompson for plaintiffs. *Ossian Ray* and *Geo. N. Dale* for defendant.

POWERS, J. The agreed facts, in substance, are that prior to the passage of the interstate commerce act the defendant promised to pay the plaintiffs a rebate of \$6 upon each of the one hundred and seventy car-loads of lumber which the plaintiffs were to deliver to the defendant for transportation from Island Pond to points in Massachusetts; and that the usual charges made to all shippers for such freight to such designation was \$38 per car-load; that prior to April 5, 1887 (the day on which the interstate commerce act took effect), the plaintiffs had delivered seventy-three car-loads for transportation as aforesaid, and after that date, had delivered the remaining ninety-seven car-loads, all of which the defendant had carried to its destination; that the defendant has paid the \$6 rebate to the plaintiffs on the seventy-three car-loads, and this suit is brought to recover such rebate on the ninety-seven car-loads. The plaintiffs have in all respects fully performed their contract, and the sole question is, can they recover the rebate on the lumber delivered for transportation according to the contract, after said April 5? It was suggested in argument that it did not affirmatively appear but that the \$6 rebate was allowed to all other patrons of the defendant shipping lumber to the same points, and so no discrimination was made in the contract in the plaintiffs' favor. But this is not the fair construction of the agreed facts, and the counsel on both sides have argued the case upon the theory that this rebate was a favor and advantage given the plaintiffs, and not enjoyed by other patrons.

Many sound reasons might be urged in support of the proposition that congress, upon those principles of justice and equity which underlie all law, cannot pass a law which will destroy or impair the obligation of existing contracts, except in bankruptcy and other instances specially enumerated in the constitution. The federal constitution expressly prohibits the passage of such laws by the states, but is silent respecting the power of congress so to

do. But, whatever may be said upon that question, it is not involved in this case. The agreed case is that, "unless the plaintiffs' right to recover is barred" by the interstate commerce act, the plaintiffs are to recover. This right of recovery is not barred if congress, in the passage of the interstate act, exceeded its power. It exceeded its power if it impaired the obligation of an existing contract. This is the syllogism that the argument upon this branch of the case is reduced to. The obligation of a contract in law is that element of duty or promise which a party can be compelled to perform. If performance cannot be compelled, there is no legal obligation in the contract. The contract in question, as it stood when made and down to April 5, 1887, is to be tested by the principles of the common law. At common law, common carriers were held to be persons who exercised their calling for the public good, upon equal terms, and with the same facilities, to all their customers. They could not lawfully exercise their calling by granting advantages to one customer which they denied to another, but were held to the duty of serving all alike. Their calling is one public in its nature, and the common law exacted of them a strict impartiality in their dealings with the public. If the plaintiffs could transport their lumber to market for \$6 per car-load less than their neighbors, they would very soon have a monopoly of the business. Many cases might be cited to show that, at common law, all such special terms and favoritism are illegal. *Messenger v. Railroad Co.*, 36 N. J. Law, 407, is a representative case, in which Beasley, C. J., states the doctrine of the common law with great clearness and force. See, also, *Audenried v. Railroad Co.*, 68 Penn. St. 370; *McDuffee v. Railroad Co.*, 52 N. H. 430; *New England Express Co. v. Maine Central R. Co.*, 57 Me. 188; *Pierce R. R.* 498. This contract, then, at the common law, had no legal binding force, so long as it was executory — no obligation which could be enforced, and, therefore, no obligation which the interstate commerce act could either impair or destroy. The interstate act, therefore, did not, in its operation upon this contract, disturb any vested rights, because no legal rights were vested when the contract was made. So long as the parties to the contract executed it, each was safe from any liability to the other by reason of such performance. In such cases the law leaves the parties just where they leave themselves.

In this case it is to be noted that the contract called for a transportation of the lumber through three states. Such carriage, therefore, is commerce between the states, within the meaning of article 1, section 8, of the federal constitution. Such commerce is solely regulated by congress, and, when parties make contracts to engage in interstate commerce, they are held to do so upon the basis and with the understanding that changes in the law applicable to their contracts may be made. There can, in the nature of things, be no vested right in an existing law which precludes its change or repeal, nor vested right in the omission to legislate upon a particular subject which, exempts a contract from the effect of subsequent legislation upon its subject-matter by competent legislative authority. *Cooley Const. Lim.* 284, 574; *Thorpe v. Railroad Co.*, 27 Vt. 140; *Ogden v. Saunders*, 12 Wheat. 214; *State v. Holmes*, 38 N. H. 225. The power to regulate commerce between the states is one given expressly in the constitution to congress. The interstate act was called into being by reason of the making of contracts like the one at bar.

Unjust discrimination was one of the chief evils in transportation which congress attempted to end by this act, and we see no reason why the act could not as properly put an end to a contract already working the mischief as to prohibit the making of one in the future. The case, then, comes to this. The plaintiffs seek to enforce a contract which is prohibited by law. The doctrine is elementary that, whenever the plaintiff is compelled, in order to make out his case, to show the illegal contract, he cannot recover. Here the rebate of \$6 is the illegal feature of this contract. This rebate is the precise thing sued for. The plaintiffs are compelled to prove that the defendant made an illegal promise to pay as the gist of their right to recover. Such promise is not enforceable. Judgment for defendant affirmed.*

Railroad companies — discrimination in freight charges — rebates.— In *Cleveland, etc., R. Co. v. Closser*, 8 Am. R. R. & Corp. Rep. 686, it is held that discriminations in the matter of freight charges in favor of particular shippers are not necessarily illegal; that if based upon the quantity of business, distance and the like, and not made unfair or oppressive, they are lawful, and that a discrimination otherwise lawful is not invalidated by the fact that the ultimate rate agreed upon is arrived at by means of a rebate. But discriminations between different persons requiring a like service are unlawful,

* Reported in 22 Atl. Rep'r. 76.

and excessive charges paid by a particular shipper may be recovered back. *Cook v. Chicago, etc., R. Co.*, 3 Am. R. R. & Corp. Rep. 550, and note. See, also, *State, ex rel., etc., v. Mo. Pac. R. Co.*, 3 Am. R. R. & Corp. Rep. 82; *State, ex rel., etc., v. Cincinnati, etc., R. Co.*, 2 Am. R. R. & Corp. Rep. 106.

PACIFIC EXP. CO. V. FOLEY.

(Supreme Court of Kansas, May 9, 1891.)

1. CARRIERS OF FREIGHT. LIMITING LIABILITY TO A SPECIFIED SUM. Where the receipt or contract of a common carrier contains a stipulation that the company is not to be held liable for any loss or damage, except as forwarders only, nor for any loss or damage of any box, package, or thing for over \$50, unless the just and true value thereof is stated in such receipt, and where the receipt fails to show any value of the box or goods shipped, the receipt or contract, if fairly and voluntarily entered into, will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, when the loss or injury to the box or goods carried results only from slight, common or ordinary negligence on the part of the carrier, its agents or servants.

2. CONFLICT OF LAWS. Where goods are delivered to a carrier in Missouri to be transported to a point in Kansas, it will be presumed that the parties contracted with reference to the laws of Missouri and the contract will be interpreted according to the laws of that state.

ERROR from district court, Douglas county, A. W. Benson, judge.

On the 4th day of November, 1887, Peter T. Foley brought his action against the Pacific Express Company before a justice of the peace of Douglas county to recover \$175, for damages alleged to have been sustained by him in the transportation of a box containing type and electrotype plates from Kansas City, Mo., to Lawrence, in this state, on October 15, 1887, from the A. N. Kellogg Newspaper Company at Kansas City, Mo., by the Pacific Express Company. The following is a copy of the receipt given by the express company for the box in controversy:

"Read this receipt.

The Pacific Express Company.

"Not negotiable.

"Received from ——— the following articles, which we undertake to forward to the point nearest to destination reached by this company only, perils of navigation excepted. And it is hereby

expressly agreed that the said Pacific Express Company are not to be held liable for any loss or damage, except as forwarders only, nor for any loss or damage of any box, package, or thing for over \$50, unless the just and true value thereof is herein stated, nor for any loss or damage by fire, the acts of God, or of the enemies of the government, the restraint of governments, mobs, riots, insurrections, or pirates, or from any of the dangers incident to a time of war; nor upon any property or thing, unless properly packed and secured for transportation; nor for any fragile fabrics, unless so marked upon the package containing the same; nor upon any fabrics consisting of or contained in glass. If any sum of money, besides the charge for transportation, is to be collected from consignee on delivery of the property described herein, and the same is not paid within thirty days from date hereof, the shipper agrees that this company may return said property to him, at their option, at the expiration of that time subject to the conditions of this receipt, and that he will pay the charges for transportation both ways, and that the liability of this company for such property, while in its possession, for the purpose of making such collection, shall be that of warehousemen only. And it is further agreed that the said Pacific Express Company shall not be held liable for any claim, of whatsoever nature, arising from this contract, unless such claim shall be presented in writing sixty days from date hereof, in a statement to which this receipt shall be annexed; and the shipper and owner hereby severally agree that all the stipulations and conditions in this receipt contained shall extend to and inure to the benefit of each and every company or person to whom the Pacific Express Company may intrust or deliver the above-described property for transportation (which the said Pacific Express Company is hereby authorized to do), and shall define and limit the liability therefor of such other company or person:

Date, 1887.	Articles.	Value.	Consignee.	Destination.	Receipt by.
Oct. 15.	1 box.		P. T. Foley.	Lawrence, Kansas.	Glaas."

On the first page of the receipt book, after the printed words, "Received from," there was written, "A. N. Kellogg N'paper Co.;" and on the following pages nothing was written in the

blank after the words, "Received from." Before the commencement of this action, J. K. Johnston, superintendent of the Pacific Express Company, tendered to Mr. Foley for that company \$50, in payment for the damage to the box, but Mr. Foley refused to accept that amount. Trial had before the justice of the peace on November 8, 1887, and the plaintiff recovered judgment for \$144.55 and interest and costs. The action was appealed to the district court. Trial had before the court with a jury at the February term, 1888. The jury returned a general verdict for the plaintiff for \$144.55, with interest, and also made special findings. Subsequently judgment was rendered upon the general verdict. The defendant excepted, and brings the case here.

A. L. Williams and Chas. Monros for plaintiff in error. *John Hutchings* for defendant in error.

HORTON, C. J. (after stating the facts as above). The principal question in this case is, what effect is to be given to the following language of the receipt executed by the express company? "It is hereby expressly agreed that the said Pacific Express Company is not to be held liable for any loss or damage, except as forwarders only; nor for any loss or damage of any box, package or thing for over \$50, unless the just and true value thereof is herein stated." It appears that the type and electrotpe plates were shipped from Kansas City to Lawrence by the A. N. Kellogg Newspaper Company, who, in making the shipment, acted for Peter T. Foley. It also appears that the newspaper company had a receipt-book furnished by the express company, and in the heading to each page were printed conditions, and, among others, the one quoted. The newspaper company, having this book in their possession and control, and using it from day to day, must be presumed to have known of its conditions, and to have shipped with reference to it. In this they acted for the plaintiff, and he must be presumed to have assented to the terms and conditions of the receipt. The jury made the following special findings in answer to questions submitted to them: "Question. Was not the box containing the type and electrotypes in controversy broken while it was still in the car in which it was brought from Kansas City? Answer. It was found broken in the car. Q. If you should find that said box was broken open by any negligence of the company,

what act or thing caused the box to be injured. A. We do not know. Q. Do the jury know where in the journey the box was injured open? If so, state where. A. We do not know. Q. Were not the agents of defendant negligent in taking the box out of the car? A. Yes. Q. Could they not have saved the contents of the box by handling the box carefully when it was taken out of the car? A. Yes, to the best of our knowledge and belief."

The *Carriers Case*, among other things, instructed the jury that "while a common carrier is generally, in the absence of any such limitation, liable absolutely, as an insurer, against all loss except that caused by the act of God and the public enemy, it may limit such liability by special conditions such as contained in this receipt, but such special contract cannot relieve the company from its own negligence. It follows that in this case the company is liable, if at all, not as an insurer, but solely for negligence in the transportation of the property. 'Negligence' is a negative term, implying the want or absence of ordinary care; that is, that care and caution that men of ordinary prudence usually exercise under like circumstances. Whether the defendant company was so negligent, and, if so, whether such negligence caused the injuries complained of, are questions of fact for the jury, to be determined from all the evidence. You should consider the condition of the material when delivered to them; the manner in which it was boxed; the nature of the articles, so far as they could be seen and known by the shipper; the manner in which such property is handled; the condition and circumstances in which it was found at the place of destination; and taking into consideration all the surrounding circumstances and facts proven, and using that ordinary knowledge, observation and experience in life that men generally possess, you must say whether the loss and injury were attributable to the want of ordinary care and diligence on the part of the express company. If they were, the plaintiff may recover his actual loss; otherwise, he cannot recover beyond the sum of \$50." The express company asked the court to instruct the jury as follows: "(1) The jury are instructed to return a verdict in favor of the plaintiff for the sum of \$50. (2) The agreement in the receipt that defendant will not be liable for more than \$50 for any shipment, unless the true value of such ship-

ment is stated in the receipt, is a valid agreement, and relieves the defendant of liability as insurer for all amounts over \$50, leaving it liable in excess of \$50 only for gross negligence, and the burden of proving gross negligence is upon the plaintiff."

1. It is settled by the decisions of this court, and by the great weight of authority, that a common carrier cannot stipulate for exemption from responsibility for the negligence of himself or his servants, on grounds of public policy, even by express contract. *Railroad Co. v. Simpson*, 30 Kans. 645; 2 Pac. Rep'r, 821; *Railroad Co. v. Lockwood*, 17 Wall. 357, and the cases therein cited; 2 Am. & Eng. Enc. Law, 822. But this is not the question presented by the record in this case. The receipt executed by the express company, and knowingly and voluntarily accepted by the shipper through his agent, expressly provided "that the express company was not to be liable for any loss or damage to the box, for over \$50, if the just and true value thereof was not stated." The true and just value of the box was not stated in the receipt or to the company by the shipper. The trial court very properly instructed the jury "that the shipper must be presumed to have assented to the terms and conditions of the receipt." Two questions are, therefore, presented for our determination: First. May a common carrier limit his liability to an amount stated in a written receipt or special contract, in the event of loss or injury to the goods or property through ordinary negligence, if such special contract is freely, voluntarily and fairly entered into by the parties, and such contract is just and reasonable in its terms? Second. Did the written receipt or special contract between the shipper and express company in this case limit the liability of the company for loss or injury to the amount of \$50?

The better authorities declare the law to be that the value of the property transported may be agreed upon, and the damage or loss to the property occasioned by the negligence of the company or its servants will be limited to the agreed valuation. The *Hart Case*, 112 U. S. 331; 5 Sup. Ct. Rep'r, 151, may now be called the leading case in America. Mr. Justice Blatchford, delivering the opinion of the court in that case, said, among other things, that "it is the law of this court that a common carrier may, by special contract, limit his common-law liability, but that he cannot stipulate for exemption from the consequences of his own

negligence or that of his servants. * * * There is no justice in allowing the shipper to be paid a large value for an article which he has delivered to the carrier to take at a low rate of freight, on the understanding and agreement that its value is a less sum than that claimed after a loss. It is just to hold the shipper to his agreement, fairly made as to value, even where the loss or injury has occurred through the negligence of the carrier. * * * The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based upon that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purpose of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss." See, also, *Harvey v. Railroad Co.*, 74 Mo. 539; *Brehme v. Dinsmore*, 25 Md. 329; *Railroad Co. v. Sherrod*, 84 Ala. 178; 4 South. Rep'r, 29; *Duntley v. Railroad* (N. H., 1890), 20 Atl. Rep'r, 327; *Magnin v. Dinsmore*, 62 N. Y. 35; *Squire v. Railroad Co.*, 98 Mass. 239-245; *Graves v. Railroad Co.*, 137 Mass. 33; *Hill v. Railroad Co.*, 144 Mass. 284; 10 N. E. Rep'r, 836; *Falkenau v. Fargo*, 35 N. Y. Super. Ct. 332; 55 N. Y. 642; *Ghormley v. Dinsmore*, 53 N. Y. Super. Ct. 36; *Westcott v. Fargo*, 6 Lans. 328; *Graves v. Adams*, 100 Mass. 505; *Pemberton Co. v. New York Cent. R. Co.*, 104 Mass. 144. See, also, *Breese v. Telegraph Co.*, 48 N. Y. 132, 139, 141, 142; *Railroad Co. v. Payne* (Va., 1890), 10 S. E. Rep'r, 749.

As to the second question proposed, we think that the limitation in the written receipt or special contract, not to be liable for any loss or damage over \$50, in this case, stands as if the carrier had asked the value of the box and its contents, and had been told

by the shipper "that the value was \$50 only," or, which is the same thing, had been told by the shipper "that, if loss or damage occurred to the box or its contents, he would not demand over \$50." In *Kallman v. Express Co.*, 3 Kans. 205, it was said that "no value was given in the bill of lading which was delivered to the shipper by the express company, and received by him without objection, thus consenting and agreeing that the plaintiffs should be bound by its terms. If he had desired to make the company responsible for the full value of the goods, he had only to furnish them with the amount, and have it inserted in the bill. But it may be said that the company was bound to make inquiry as to the value of the goods, if they desired to obtain the benefit of this limitation upon their liability. We confess that we are not able to see any good reason for making such a requirement a condition precedent in such case. The company exhibits to the employer the exact condition upon which they will receive his property for carriage, to which he may assent or not, as he may choose. If he assent, we think he should be bound thereby. As in this case, if the real value of the property was \$592.53, the employer, in case of loss, would be as much, nay more, interested in having such value truly stated in the bill of lading or receipt as the company could possibly be in having the value understated. He ought, then, to have made known to the company the true value of the goods, and more especially as the limitation upon the liability of the company was so plainly stated in the receipt." We do not quote this part of the opinion in the above case because it is necessarily conclusive or binding as a prior decision of this court, as, in that case, the trial court granted a new trial. This court affirmed the action of the court below. Much said in the former opinion, outside of affirming the action of the court in granting a new trial, we consider *obiter dictum*. The trial court in that case, in granting the new trial, did not pass upon a pure, simple and unmixed question of law. This court has decided time and again that "the granting of a new trial is largely in the discretion of the trial court; and where a new trial is given, and the record does not show upon what grounds the court granted such new trial, but the record does show errors upon which the trial court might have granted a new trial, the order granting such trial will not be disturbed." *Barney v. Dudley*, 40 Kans. 247; 19 Pac. Rep'r, 550; *Howell v. Pugh*,

Express Company a box weighing twenty-five pounds, from New York city to Oppenheimer & Co., at Chicago, Ill. It contained jewelry of the value of \$3,800. The receipt given by the express company was similar in that case to the receipt given by the Pacific Express Company in this case. The blank for the value of the box and contents was not filled in. But the limitation of \$50 was in the receipt in that case, as in this. The box and its contents were destroyed by fire in the office of the express company at Chicago. Oppenheimer & Co. brought an action to recover for the value of the contents of the box. Judgment was rendered in their favor for \$50 only. They appealed. The judgment of the lower court was affirmed by the supreme court of Illinois. In rendering its opinion that court said: "The terms and conditions on which the company received the property for transportation were clearly expressed in the body of the receipt, and in a way not calculated to escape attention. It must be supposed that these men paid some attention to the transaction of their business, and were reasonably well informed in regard to the nature of their contracts. That they should have been so doing business with this company for years, handling, filling out and procuring the execution of these shipping receipts without a knowledge of their general character and effect, it is difficult to believe. They must be held to have had such knowledge * * *

A distinction exists between the effect of those notices by a carrier which seek to discharge him from duties which the law has annexed to his employment, and those, like the one in question, designed simply to insure good faith and fair dealing on the part of his employer — in the former case, notice alone not being effectual without an assent to the attempted restriction; while in the latter case, notice alone, if brought home to the knowledge of the owner of the property delivered for carriage, will be sufficient." A part of the syllabus of that case reads: "An express company has the right to demand from a consignor such information as will enable it to decide on the proper compensation to charge for the risk and the degree of care to bestow in discharging its trust; and a limitation of its liability, not to exceed \$50, unless the value of the goods forwarded is truly stated, if brought to the knowledge of the consignor, is reasonable and consistent with public policy." The court finally disposed of the above case

upon the ground that there was a "designed suppression of the value of the goods." It was said in the opinion, among other things, that "there was an actual attempt here by the agent of the shippers to fill in this blank space, but, instead of inserting '3,800' (the value), a mark or character was inserted inexpressive of any value. This shows that there was a designed suppression of the value of the goods. That was unfair conduct on the part of the shipper of the goods. The effect of such conduct to relieve the carrier from his liability as insurer is asserted in many cases [here decisions are given]. Had the true value of the goods been disclosed, there would have been an extra charge of \$9.50, increased precaution would have been taken for the safety of the goods, and, as the evidence shows, they would have been saved."

It may be said, in every case, that where a shipper fixes an agreed valuation upon his goods to be transported, or enters into a special contract with the carrier that if his goods are lost or injured he will not demand over \$50, and thereby obtains cheaper rates, he is guilty of fraud, or attempted fraud, if his goods are lost or injured, and he demands for his damages an amount above the valuation or limitation agreed to. If it be true, as the trial court charged the jury, that "the plaintiff must be presumed, under the facts of this case, to have assented to the terms and conditions of the receipt," then, within the better authorities, the limitation of the carrier's liability, not to exceed \$50, was the same as fixing the value of the property transported at \$50 only, and the limitation of the express company's liability, not to exceed the \$50 stated in the receipt, was reasonable and just. *Boorman v. Express Co.*, 21 Wis. 154, is a case like this. A limitation of \$50 was contained in the receipt. Chief Justice Dixon, writing the opinion, held that "an express company may exempt itself by special contract from liability as insurer; or for the default or negligence of any person to whom the property may be delivered by it, for the performance of any act or duty in respect thereto, off its own routes; or for loss or damage of any package for over \$50, unless the just and true value thereof is stated in the receipt." In *Duntley v. Railroad*, *supra*, it was decided that "a regulation of a carrier with respect to the transportation of live animals, which fixes the ordinary value of horses, for which

it will hold itself responsible in case of loss, at \$200 each, and requires extra compensation for transporting animals of greater value, is reasonable and valid." In *Durgin v. Express Co.* (N. H., 1890), 20 Atl. Rep'r, 328, the receipt was like the one in this case, and limited the liability to \$50. It was held that "a shipper of goods who fills out one of the blank receipts contained in a book previously furnished by an express company for his use, and obtains the signature of the company's agent thereto, upon delivering to him a package for transportation, will be presumed to know the contents of the receipt; and, if he receives such receipt without objection, his assent as to its conditions will, in the absence of fraud, be conclusively presumed." Clark, J., in delivering the opinion in that case, said: "The receipt signed by the defendant's agent and servant at the time of the delivery of the package was taken by the plaintiff as evidence of the fact and purpose of its delivery, and of the terms and conditions on which the defendants received it. The receipt was contained in a book of blank receipts previously furnished by the defendants for the use of the plaintiff, and the written portions were in his handwriting, and the law presumes that the contents were known to him. The plaintiff understood it to be the shipping contract, and, in the absence of fraud, by receiving it without objection, he was conclusively presumed to assent to its conditions. *Merrill v. Express Co.*, 62 N. H. 514; *Grace v. Adams*, 100 Mass. 505.

It is now generally held that the responsibility imposed on the carrier of goods by the common law may be restricted and qualified by express stipulation, where such stipulation is just and reasonable; and a stipulation that the carrier shall be informed as to the value of the goods delivered to him for carriage, as affecting the risk, and the degree of care required, is clearly reasonable. * * * The plaintiff understood that he was securing transportation of the box to New York at a reduced rate (in fact, at one-fifth of the regular rate), by calling the value \$50, and assuming a portion of the risk of carriage himself; and, having agreed upon a valuation for the purpose of fixing the express charges, he cannot insist that the goods are of greater value, for the purpose of increasing his claim for damages for the loss. Nor is it material whether the loss arose from the negligence of the defendants or some other cause. The defendants agree to respond in a sum

not exceeding \$50 in case of loss, and, for the purpose of the contract of transportation between the parties to the contract, the goods had no greater value." See, also, to the same effect, *Squire v. Railroad Co.*, 98 Mass. 239; *Railroad Co. v. Henlein*, 52 Ala. 615; *Magnin v. Dinsmore*, 56 N. Y. 168; *Railroad Co. v. Weakly*, 50 Ark. 397; 8 S. W. Rep'r, 134. In *Railroad Co. v. Wynn* (Tenn., Jan. 2, 1890), 14 S. W. Rep'r, 311, special contracts for a limitation of the liability of a carrier are not sustained. It is said in that case, among other things, that "to our minds it is perfectly clear that the two kinds of stipulation — that providing for total, and that providing for partial, exemption from liability for the consequences of the carrier's negligence — stand upon the same ground, and must be tested by the same principles. If one can be enforced, the other can; if either be invalid, both must be held to be so — the same considerations of public policy operating in each case." In our opinion, the reasons stated are wholly untenable. They proceed upon false premises. That court overlooks the power of the shipper to freely and fairly fix a valuation upon his own property. The carrier has the right to make reasonable rates for carriage. A total exemption from the liability on the part of a carrier would not be just or reasonable, and no person, having reason, would willingly and freely contract with a carrier that the property that he wished to have transported was absolutely worthless. The carrier is bound to receive and transport the property of the shipper. The shipper can place his own valuation upon the property delivered by him to the carrier to be transported. The carrier cannot arbitrarily fix any valuation on the property received from the shipper, but may reasonably insist on proper information as to the value of the property which he receives. He ought to have a right to know what it is that he undertakes to carry, and the amount and extent of his risk. Upon the value of the property, the risk incurred, and the distance the property is to be transported, the charges for carriage are fixed. Therefore, it would seem to us that a contract fixing the value of the goods delivered to the carrier, or fixing a limitation of damage in case of loss or injury is clearly reasonable, as affecting the risk and degree of care required concerning the property to be transported. With the above and foregoing limitations, we cannot conceive how the carrier can evade his duty or

nullify the law. Upon the authorities cited, the instructions of the trial court were erroneous, and the instruction prayed for by the express company for limitation as to damages should have been given.

There is nothing appearing in the evidence or the findings of the jury that show, or tend to show, gross negligence, fraud or intentional wrong upon the part of the express company. In the case of *Railroad Co. v. Simpson*, 30 Kans. 645; 2 Pac. Rep'r, 821, the limitation was arbitrarily fixed by the carrier without the consent of the shipper. That contract was not just or reasonable, or freely or fairly entered into. It was in violation of public policy. It is unlike this case, because, when the box in controversy was shipped, the shipping clerk of the Kellogg Newspaper Company filled out a receipt, and a man by the name of Glass, a driver for the Pacific Express Company, signed it. No deceit or unfairness was practiced by the express company. In the case of *Telegraph Co. v. Crall*, 38 Kans. 679; 17 Pac. Rep'r, 309, gross negligence was involved. Whether a telegraph company could exempt itself by contract from ordinary negligence was not passed upon. That question was reserved. We do not think it is necessary to follow all that was stated in *Kallman v. Express Co.*, *supra*, because, although that decision was made nearly twenty-five years ago, the question now at issue was not necessarily embraced in that decision, for the reasons heretofore named. The case of *Railroad Co. v. Simpson*, *supra*, followed *Railroad Co. v. Lockwood*, 17 Wall. 357. This case is referred to and clearly distinguished in the latter case of *Hart v. Railroad Co.*, *supra*.

Again, the box containing the type and plates was shipped from Kansas City, Mo. The receipt executed by the express company was executed and delivered at Kansas City, Mo., to the Kellogg Newspaper Company for P. T. Foley, the plaintiff below. In that state the law declared by the supreme court is that "a contract fairly entered into between carrier and shipper, specifying a fixed sum as the value of the property and limiting the recovery in case of loss to that sum, is binding on the shipper." *Harvey v. Railroad Co.*, 74 Mo. 538. We must assume, so far as this case is concerned, that the parties, including the shipper and the express company, contracted with reference to the law of Missouri. The receipt was signed there, the box was delivered there, and

was shipped from Missouri to Kansas. It seems to us that the shipper ought not to complain. If he had desired to insert in the receipt, which the express company was asked to sign, \$144.55 as the full value of the box, or if he had desired to insert any larger amount, he had the option so to do, and if he had inserted the full value of the box and its contents he could have recovered the value. But as the shipper voluntarily limited his loss or damage to the sum of \$50 only, why should he refuse to receive the sum of \$50, which was tendered him by the superintendent of the express company when he presented his claim for damages? The receipt, as executed, was just as he desired and wished it. The damage in case of loss or injury to the box or its contents was liquidated in advance by the voluntary action of the parties. "The limitation as to the damages or value has no tendency, in such a case as this, to exempt from liability for negligence." *Hart v. Railroad Co.*, *supra*.

Generally, the charges for transporting a box or package valued at \$144.50, \$500, or \$1,000 are more than when the value is \$50 only, and if the shipper wishes to pay full charges and recover full value, in case of loss or injury from negligence, why should he not state to the carrier, or write in the receipt to be signed by the carrier, the full value? We now repeat what was said upon this point in the *Kallman Express Co.'s Case*, 3 *Kans.* 205, where the receipt was left blank as to the value, as in this case, but where a limitation was inserted in the receipt in case of loss or damage: "The company exhibits to the employer the exact conditions upon which it will receive his property for carriage, to which he may assent or not, as he may choose. If he assent, we think he should be bound thereby. As in this case, if the real value of the property was \$592.53, the employer, in case of loss, would be as much, nay more, interested in having such value truly stated in the bill of lading or receipt as the company could possibly be in having the value understated. He ought, then, to have made known to the company the true value of the goods, and more especially as the limitation upon the liability of the company was so plainly stated in the receipt." The judgment of the district court will be reversed, and the cause remanded for a new trial.

Johnston, J., concurs.

VALENTINE, J. (dissenting). I think we should follow the decision made in the case of *Kallman v. Express Co.*, 3 Kans. 205 — First, because it is right; and, second, for the following reasons: It was made on February 17, 1865, more than twenty-six years ago; the courts have been open ever since, and twenty or more sessions of the legislature have intervened, and yet no modification of any of the rules therein enunciated have been made, but all seem to have been acquiesced in; and for these reasons it must be presumed that the parties to this action, and especially the express company, contracted with reference to such rules; and now, to overturn them, and to declare different rules for this case, would virtually be to make a new contract for the parties; and construing the present contract as the contract in that case was construed would render the contract valid, while to construe it as the express company now desires to have it construed would render it void. To construe the contract so as to limit the express company's common-law liability only as an insurer, and only for losses and injuries brought about by other causes than the company's own negligence, fraud or willful wrongs, would render the contract valid; while if it be construed in such a manner as to reach to the domain of negligence, fraud and willful wrongs on the part of the express company itself, and to limit the company's liability so that the company would not be liable for losses occasioned by its own negligence, fraud or willful wrongs, would render the contract to that extent invalid and worthless.

It must be remembered that in this case the value of the property transported was not agreed upon. Whether it was worth 1 cent, \$1, \$100, \$1,000 or any other sum, greater or less, is left wholly blank. There seems to have been no thought of fixing, by contract or otherwise, the actual value of the property, or any value, but it was actually worth \$144.55. In this failure to fix the value of the property by contract, this case differs essentially from the case of *Hart v. Railroad Co.*, 112 U.S. 332; 5 Sup. Ct. Rep'r, 151. There are other distinctions between the present case and those relied on by the express company. For instance, the shippers themselves, in some of the cases relied on by the express company, were guilty of fraud or unfair dealing, as in the case of *Oppenheimer v. Express Co.*, 69 Ill. 62, 68. In that case the shippers delivered to the express company for transportation,

a certain box containing watches and jewelry of the value of \$3,800, without disclosing its contents or their great value, and paid only \$1.40 for its transportation ; while, if they had disclosed its contents and their value, they would have had to pay \$10.90 for its transportation. The receipt which they took from the express company did not state the contents or the value of the goods, but stated, "Contents unknown." The court, in commenting upon these matters, used the following, among other, language: "There was an actual attempt here by the agent of the shippers to fill in this blank space, but, instead of inserting '3,800' (the value), a mark or character was inserted inexpressive of any value. This shows that there was a designed suppression of the value of the goods. That was unfair conduct on the part of the shippers of the goods. The effect of such conduct to relieve the carrier from his liability as insurer is asserted in the cases of [here certain cases are given]. Had the true value of the goods been disclosed, there would have been an extra charge of \$9.50, increased precautions would have been taken for the safety of the goods, and, as the evidence shows, they would have been saved." In this case of *Oppenhemier v. Express Co.*, no pretense of fault or negligence on the part of the express company was imputed, but, on the contrary, it was admitted by the parties that the company was not guilty of any fault or negligence ; and in the later case of *Railroad Co. v. Chapman*, 24 N. E. Rep'r, 417, 419 (decided by the supreme court of Illinois on May 14, 1890), it is stated as follows: "In *Oppenheimer v. Express Co.* 69 Ill. 62, the court held that the contract exempting carriers from liabilities is not to be construed as providing against loss or injury occasioned by actual negligence on their part." Indeed, the case of *Oppenheimer v. Express Co.* has no application to this present case. In the present case the shipper was not guilty of fraud or unfair dealing, and the express company was unquestionably guilty of culpable negligence.

In the case of *Bank v. Brown*, 9 Wend. 85, 114, et seq., an intended passenger on a steamboat, without paying extra fare, took with him on the steamboat as baggage an ordinary traveling trunk containing \$11,250. In a few minutes afterward the trunk and its contents were removed, and the owner never recovered them. The owners of the steamboat had no knowledge of the

contents of the trunk, nor of their great value, and it was held that they were not liable for their loss. Other distinctions might be shown between this case and the cases relied on by the express company, if it were thought necessary. The stipulation contained in the receipt given by the express company in the present case, limiting its liability for loss or damage, does not limit its liability, except with respect to an amount in excess of \$50. Up to that amount the express company's liability remains precisely the same as it would be at common law, or as it would be if no contract limiting its liability had ever been made. But for the excess above \$50 the express company claims that it has obtained a boundless immunity from liability; that it has not only obtained an absolute exemption from all liability for all loss or damage above that amount, where the loss or damage has occurred without fault or negligence on its part, but that it has also obtained such an exemption where the loss or damage has been occasioned by its own negligence, or by its own fraud or willful wrongs, including the willful destruction of the property, or the greater wrong of feloniously stealing it. This cannot be correct. The stipulation in such receipt ought to be so construed as to exempt the company from liability for only such loss or damage in excess of \$50 as might be occasioned by the fault or negligence of others, or as might result from some accident, casualty or misfortune over which the company could have no control. I think the weight of authority sustains this view. While a common carrier may make a valid contract exempting himself from his common-law liability as an insurer and for losses occasioned by the acts of others without his fault, or occasioned by such of his own acts only as do not involve any kind of wrong, or occasioned by circumstances over which he has no control, yet he cannot make a valid contract exempting himself from liability for losses occasioned by his own carelessness or negligence or improper acts. Such a contract would be against public policy, and void. I think the contract in the present case should be construed precisely as though it did not attempt to limit the express company's liability at all for losses occasioned by its own negligence or improper conduct, and I would refer to the following authorities in support of this view: *Kallman v. Express Co.*, 3 Kans. 205; *Railroad Co. v. Simpson*, 30 Kans. 645; 2 Pac. Rep'r, 821; *Railway Co. v. Peavy*, 29 Kans. 169; *Telegraph v.*

Orall, 88 Kana. 679; 17 Pac. Rep'r, 309; Farnham v. Railroad Co., 55 Penn. St. 53; Express Co. v. Sands, 55 Penn. St. 140; Grogan v. Express Co., 114 Penn. St. 523; 7 Atl. Rep'r, 134; Weiller v. Railroad Co., 134 Penn. St. 310; 19 Atl. Rep'r, 702; Express Co. v. Moon, 39 Miss. 822; Railroad Co. v. Abels, 60 Miss. 1017; Express Co. v. Seide, 67 Miss. 609; 7 South. Rep'r, 547; Kirby v. Express Co., 2 Mo. App. 370; McFadden v. Railway Co., 92 Mo. 343; 4 S. W. Rep'r, 689; Moulton v. Railway Co., 31 Minn. 85; 16 N. W. Rep'r, 497; The City of Norwich, 4 Ben. 271; Railroad Co. v. Lockwood, 17 Wall. 357; Liverpool Steam Co. v. Phenix Ins. Co., 129 U. S. 397; 9 Sup. Ct. Rep'r, 469; Rosenfeld v. Railway Co., 103 Ind. 121; 2 N. E. Rep'r, 344; Express Co. v. Harris, 120 Ind. 73; 21 N. E. Rep'r, 340; Railway Co. v. Harris, 67 Tex. 166; 2 S. W. Rep'r, 574; Railway Co. v. Maddox, 75 Tex. 300; 12 S. W. Rep'r, 815; Erie Dispatch v. Johnson, 87 Tenn. 490; 11 S. W. Rep'r, 441; Railroad Co. v. Wynn, 88 Tenn. 320; 14 S. W. Rep'r, 311; Railroad Co. v. Gilbert, 88 Tenn. 430; 12 S. W. Rep'r, 1018; Black v. Transportation Co., 55 Wis. 319; 13 N. W. Rep'r, 244; Railroad Co. v. Hopkins, 41 Ala. 486; Express Co. v. Stettaners, 61 Ill. 184; Railway Co. v. Chapman, 24 N. E. Rep'r, 417, 419 (Ill., May 14, 1890); Judson v. Railroad Corp., 6 Allen, 486; Orndorff v. Express Co., 3 Bush, 194; Express Co. v. Backman, 28 Ohio St. 144; Lamb v. Railroad Co., 46 N. Y. 271.

In my opinion, notwithstanding the stipulation in the aforesaid receipt, limiting to some extent, the liability of the express company, the company was still bound, at its peril, to act in good faith, as toward its employer, and to exercise reasonable care and diligence with respect to its employer's goods. There was ample evidence to show negligence on the part of the express company, if not gross negligence. The goods were shipped from Kansas City in good order. When they arrived at their destination, at Lawrence, the box containing them was found broken. With due care, however, they might still have been saved, as is fairly inferable from the evidence, and as was the opinion of the jury according to their findings. The box, however, was turned over by one of the express company's agents, and a piece came out. Afterward the company's agents attempted to take the box and contents from the express-car in which they were transported, and

to put the same on a truck, and in doing so some of the type and some of the electrotpe plates fell down between the car and the platform. Afterward they gathered them up, and put them into a coal scuttle, and took them to a house belonging to the express company, where they remained for some time, and were afterward removed to the express company's office, where they still remain, so far as is shown. This seems like gross negligence. It was not necessary, however, that gross negligence should have been shown. Ordinary negligence only, or, in other words, a want of ordinary care, was all that was necessary. In the case of *Kallman v. Express Co.*, *supra*, the following, among other, language, with reference to express companies limiting their common-law liability, is used: "An examination of the authorities bearing upon this point will, we think, show that they may do so, provided, however, that due care and diligence be used in the discharge of their trust. But carriers cannot in this way shield themselves from the consequences of fraud, gross negligence and want of care. * * * It is only when such carriers act in good faith, and use due care and diligence in and about their business, that the law permits them to have the benefit of limitations like that under consideration."

In the case of *Railroad Co. v. Wynn*, *supra*, the following, among other, language is used by the court: "The author of *American and English Encyclopædia of Law*, says: 'By the clear weight of authority in England, Canada, the United States, and almost without exception in the states of the Union, the rule has been adopted that the common carrier can make no contract the effect of which will be to exempt him from liability for negligence.' 2 *Amer. & Eng. Enc. Law*, 822. Is the limitation in the contract before us within the prohibition of this eminently just and generally accepted principle? Manifestly the stipulation does not contemplate total exemption from liability; it only provides for partial or limited exemption. Upon that distinction the nice and important question arises, can a stipulation of the latter character stand before the law when one of the former kind cannot? Or, to state the same question differently, and so as to apply it more directly to the facts of this case, the rule of law being established, as we have seen it is, that the defendant company could not lawfully have contracted with the plaintiff that it

would in no event be liable for any part of the value of the mare, if not so destroyed, can the limitation of its liability to \$100 be upheld in the contract if it should appear that her loss resulted from the negligence of the company, and that she was in fact worth eight times that amount as the jury found her to be? We unanimously answer, "No." The carrier cannot by contract exonerate itself from liability for the whole or any part of a loss brought about by its negligence. To our minds it is perfectly clear that the two kinds of stipulation — that providing for total, and that providing for partial exemption from liability for the consequences of the carrier's negligence — stand upon the same ground, and must be tested by the same principles. If one can be enforced, the other can; if either be invalid, both must be held to be so — the same considerations of public policy operating in each case. With great deference for those who may differ with us, we think it entirely illogical and unreasonable to say that the carrier may not absolve itself from liability for the whole value of property lost or destroyed through its negligence, but that it may absolve itself from responsibility for one-half, three-fourths, seven-eighths, nine-tenths or ninety-hundredths of the loss so occasioned. With great unanimity the authorities say it cannot do the former. If allowed to do the latter, it may thereby substantially evade and nullify the law, which says it shall not do the former, and in that way do indirectly what it is forbidden to do directly. We hold that it can do neither. The requirement of the law has ever been, and is now, that the common carrier shall be diligent and careful in the transportation of its freight, and public policy forbids that it shall throw off that obligation by stipulation for exemption in whole or in part from the consequences of its negligent acts." In the case of *Express Co. v. Seide*, supra, the supreme court of Mississippi decided as follows: "A stipulation in a receipt given by an express company that, if the value of the goods shipped is not stated by the shipper and specified in the receipt, the holder will not demand more than \$50, for loss or damage, exempts the carrier from greater liability only when the loss did not result from negligence on its part. This is true, although a greater charge is made for carrying packages over \$50 in value, and the shipper fails to state the value, and pays the minimum charge." Part of syllabus. In the case of *Kirby v. Express Co.*, supra,

the court of appeals of St. Louis, Mo., decided as follows: "A clause in a contract between an express company and a shipper stated that goods shipped are of the value of \$50, unless their value should be inserted in the contract, and that the company, in case of loss, would not be liable for more than \$50, less the value was so inserted, and the value of the goods was not inserted. Held, that this did not relieve the company from liability for the full value of the goods if lost through its fault, and that a presumption of negligence arose from the mere fact of loss." Part of syllabus. In the case of *McFadden v. Railway Co.*, 92 Mo. 343; 4 S. W. Rep'r, 689, the supreme court of Missouri decided as follows: "While a shipper may release a common carrier from its obligations as an insurer of his property, yet the carrier cannot, by any kind of stipulation exempt itself from liability for its own negligence." Part of syllabus. See, also, the other cases above cited, and especially the Pennsylvania cases. I think the judgment of the court below should be affirmed.*

Common carriers — limiting liability. — See generally upon this subject the following cases and notes in these reports: *Quimby v. Boston & Me. R. Co.*, 1 Am. R. R. & Corp. Rep. 118, and note; *Louisville & N. R. Co. v. Gilbert*, 1 Am. R. R. & Corp. Rep. 468; *Richmond & Danville R. Co. v. Payne*, 1 Am. R. R. & Corp. Rep. 475; *Louisville & N. R. Co. v. Wynn*, 8 Am. R. R. & Corp. Rep. 13, and note; *Duntley v. Boston & Me. R. Co.*, 8 Am. R. R. & Corp. Rep. 259, and note; *Hand v. Chicago, etc., R. Co.*, post, and note.

FORD V. LAKE SHORE & M. S. RY. CO.

(Court of Appeals of New York, Second Division, March 17, 1891.)

1. RAILROAD COMPANIES. INJURY TO EMPLOYEE. NEGLECT TO ESTABLISH PROPER RULES. A railroad company provided proper cars, and the stakes necessary to secure freight on flat-cars, but established no rules for the loading of lumber, except a general one, requiring employees "to attend to the loading of all freight, * * * to see that it is safely stored, and so that it cannot fall off the cars." While one of the company's cars, loaded with lumber without the use of stakes, was going a short distance, several sticks fell off, and killed plaintiff's intestate, who was free from contributory negligence. Held, that the failure to establish a rule requiring lumber loaded on flat-cars to be se-

* Reported in 26 Pac. Rep'r, 665.

cured in all cases rendered the negligence of those loading the cars imputable to the company, even though they were fellow-servants of deceased.

2. PRACTICE. QUESTION FOR JURY. The rule in question being insufficient as a matter of law, defendant cannot complain that the case was submitted to the jury in such manner that they might have found as a matter of fact that the rule in question was a sufficient performance on the part of the company, of its duty toward its servants.

APPEAL from a judgment of the general term of the superior court of Buffalo, entered upon an order dated December 31, 1890, affirming a judgment directed to be entered upon special findings of fact, and also affirming an order denying a motion for a new trial. This action was to recover damages for negligently causing the death of the plaintiff's husband, a switchman in the employ of the defendant. On the night of May 20, 1887, while at his post of duty, he was struck by heavy timbers which fell from a passing car, and received injuries from which he soon after died. The case has been once before in this court (117 N. Y. 638; 22 N. E. Rep'r, 946), and the material facts are very fully stated in the opinion of Judge Earl there delivered. Other facts are stated in the opinion.

James F. Gluck for appellant. *Tracey C. Becker* for respondent.

BROWN, J. (after stating the facts as above). Upon the first appeal of this case the judgment which the plaintiff had recovered was reversed by this court, on the ground that the cause of the accident was attributable solely to the negligence of the fellow-servants of the deceased in improperly loading the lumber upon the cars. There was then no question whether the defendant was guilty of negligence in failing to establish a proper rule or method for the loading of lumber. The court on the first trial charged the jury that there was no evidence that the defendant was called upon to establish any system of rules which should provide for any different or safer method in the loading of the lumber than that described by the witnesses, and, as the plaintiff had a verdict, no question was or could be raised on appeal as to the correctness of that charge. Upon the last trial it appeared that the only written rule that the defendant had established which it was claimed had reference to the loading of lumber was one known as No. 82,

and which required its employees "to attend to the loading of all freight, whether loaded by station-men or by shippers, to see that it is safely stored, and so that it cannot fall off the cars."

It appeared that the defendant had also furnished to its employees stakes to be used in making secure freight placed upon flat or gondola cars, and the witnesses for the defendant, who had loaded or inspected the cars in question, testified that they knew that stakes were necessary in making the lumber secure, and that when there were no brackets on the side of the cars, as in this case, the stakes could be placed inside the box, between the side of the car and the lumber, and fastened by being nailed or spiked to the side. But that course was not pursued in this case, for the reason that on account of the short distance the lumber was to be carried it was not deemed necessary. The plaintiff also gave proof tending to show that on other roads a verbal rule existed that in loading lumber it should be secured by stakes on the sides, and stays across the top of the load, whenever it was loaded above the side of a car, and that the rule applied in all cases, no matter what the distance was over which the lumber was to be carried; that no verbal rule of this character prevailed on defendant's road, and no instruction to that effect was ever given to its employees. This testimony was not given upon the first trial. At the close of the evidence the trial court submitted eight special questions to the jury, stating that upon the answers to those questions it would determine which party would be entitled to judgment. Upon the special findings thus made judgment was directed for the plaintiff. This mode of submitting the case to the jury was acquiesced in by both parties, but the defendant claimed, and now claims, that there was not evidence sufficient to justify a verdict for the plaintiff, and that the complaint should have been dismissed, and by appropriate exceptions the question is presented here whether the findings of the jury have support in the evidence.

That the car in question was improperly loaded, and that such was the cause of the intestate's death, and that he was free from any negligence contributing to the injury, are facts found by the answers to the first three questions, and are not disputed on this appeal. The seventh and eighth findings related to the question of plaintiff's damages, and the amount. The fifth question was

as follows: "Did the defendant provide, make and promulgate a proper and sufficient rule with respect to the loading of the cars with lumber, including the car from which the lumber fell, which, if faithfully observed, would have given reasonable protection to its employees?" which question the jury answered in the negative. We are of the opinion that the answer to this question supports the judgment rendered. The intestate, upon entering the defendant's employ, assumed and assented to the ordinary risks incident to the service. But employers cannot avail themselves of this assent unless they take reasonable precautions to insure the servant's safety while in the performance of his duties, and there can be no exemption from liability for injuries sustained by a servant when such injuries are traced to the employer's failure to take such precautions. Within the operation of this principle a corporation is bound to carry on its business under a proper system, and under reasonable rules and regulations, and if, through a failure to establish such, a servant is injured, the corporation is liable.

The master is responsible for his own negligence and want of care, and this may appear from his failure to furnish proper machinery and materials for the work, or from the employment of incompetent and unfit servants and agents, or from a failure to make proper rules or establish a proper method for the conduct of his business. These are the master's duties, and responsibility cannot be evaded by their delegation to agents. As to such acts, the agent occupies the master's place, and the latter is deemed present and liable for the manner in which they are performed, *Flike v. Railroad Co.*, 53 N. Y. 549; *Fuller v. Jewett*, 80 N. Y. 46. In the case before us it was clearly the duty of the defendant to adopt some system for the loading of lumber upon open cars that would have regard for the safety, not only of its servants and those traveling over its road, but to the safety of all persons who should be in the vicinity of its cars. The importance and extent of the business, and the manifest danger from the falling of heavy sticks of timber from the cars, required this. But there was no rule on the subject. The only rule shown to exist had no particular reference to lumber more than any other freight, and it expressed nothing more than the obligation which the law put upon the corporation, viz., to take due care that freight was safely loaded, and should not fall from the car. But method or

system as to loading lumber there was none. Having furnished a good car, and stakes that might be used, the manner of loading lumber was left to the judgment and discretion of its agents and servants. It was not sufficient for the defendant to show that its employes knew that the rule I have quoted applied to lumber, and also knew that the general usage required it to be staked, and that stakes were furnished and available to the men in the particular case before us. All this may be assumed to be true, and yet the fact exists that the use of the stakes was not enjoined upon the servants by any rule of the defendant or by any instruction ever given them. Having furnished the car and the stakes, it was left to the judgment and discretion of the foreman whether to use the stakes or not, and in this particular instance they were not used, for the reason that they supposed the lumber would stay on the car over the short distance it was to be carried; and it is because of the failure of the defendant to require the use of the stakes in all cases that the neglect of its servants in this case is imputed to it. There was no rule, and the only method or system was such as the foreman in each particular case should deem the safe and proper one to pursue. Under such a state of facts the employer must be deemed constructively present during the loading of the cars, and the acts of his agents are in law deemed to be his acts. The improper and negligent loading of the cars is thus traced directly to the defendant, and its negligence established.

Thus far I have treated the construction of rule 82 as a question of law, but in the question submitted to the jury there was opportunity for a finding of fact that the making of that rule was a sufficient performance on the part of defendant of its duties toward its servants, and it is unnecessary to say more upon the exception of the defendant to the submission of that question, as one of fact to the jury, than that it was a ruling as favorable toward it as the facts of the case warranted. The view of the case herein expressed renders unnecessary any reference to the other findings of the jury which the respondent claims establish the negligence of the defendant. We find no error in the record, and the judgment must be affirmed. All concur, except, Follett, C. J., dissenting.*

* Reported in 26 N. E. Rep'r, 1101.

1. **Railroad companies — duty to establish and enforce proper rules — liability for neglect.**— In an action against a railroad company for causing the death of a fireman, the evidence showed that the death was caused by a collision between the train on which he was working and an engine standing on the main track in defendant's yard; that there was a rule against leaving engines standing on the main track, but that this rule had been systematically violated for at least a year. Held, that the question of defendant's negligence should have been submitted to the jury, since it was its duty, not only to make proper rules, but to enforce them. *Whittaker v. Delaware & H. Canal Co.*, 126 N. Y. 544; 27 N. E. Rep'r, 1042.

2. **Not liable when accident due to neglect of fellow-servant to observe rules.**— In an action by a servant against his master for personal injuries caused by the negligence of a fellow-servant, it is proper to instruct the jury that, if defendant failed to exercise reasonable care in providing such rules or usages for the conduct of its business as to afford its servants reasonable means of protection, and such failure was the cause of the accident, defendant would be liable, unless plaintiff was, by his own negligence, precluded from recovering, but that the plaintiff cannot recover if defendant had provided such rules, and plaintiff was hurt through failure of his fellow-servant to obey the rules. *International, etc., R. Co. v. Hall*, 78 Tex. 657; 15 S. W. Rep'r, 108.

3. **Injury while violating rules — contributory negligence.**— When the rules of a railroad company require baggage-masters not to leave their car except when necessary, and then only for as short a time as possible, and forbid their riding on the engine, the company is not liable for injuries sustained by a baggage-master while riding on the engine, though the injury was caused by the negligence of an employe of the company. *Louisville, etc., R. Co. v. Wilson*, 88 Tenn. 816; 12 S. W. Rep'r, 720.

4. **Rules held not to increase liability of employe.**— Rules of a railroad company requiring that engineers, when the view is obscured, shall control their engines so that they can stop within range of their vision; that delayed trains must run with great caution; that all trains must approach stations with reduced speed, and that in approaching switches the greatest care must be taken, do not increase the liability of engineers, but simply call their attention to their common-law duty of using due skill and diligence. *Lake Shore, etc., R. Co. v. Parker*, 181 Ill. 557; 28 N. E. Rep'r, 287.

5. **Rules for protection of car-repairers — sufficiency of.**— Where the rules of a railroad company require car-repairers to see that they are protected by a certain flag when under and between cars, and require all employes to acquaint themselves with the rules, and keep a copy of them, and such rules are posted on bulletin boards, and printed on the back of time-tables, and kept for distribution at all points where employes can get them, such rule is sufficient for the protection of a car-repairer working under a car, though it does not expressly prohibit other servants from moving other cars against cars protected by the flag. *Corcoran v. Delaware, etc., R. Co.*, 126 N. Y. 678; 27 N. E. Rep'r, 1022.

6. **Violation of rules by co-servant — liability of company.**— In an action against such company for an injury received by plaintiff while at work under a car which was protected by the required flag, caused by the act of a co-ser-

vant in moving other cars against such, it is error to refuse to charge that, if the cause of the injury was the act of the co-servant, plaintiff cannot recover. *Ibid.* So when an engineer started his engine in the night upon hearing part of a verbal order to go ahead, which he misunderstood and erroneously applied to himself, without waiting for the signal required by the rules, and collided with another engine standing on the same track, whereby the fireman on the latter was killed, it was held that the company was not liable, there being no evidence that the absence of proper rules caused the accident. *Peaslee v. Fitchburg R. Co.*, 152 Mass. 155; 25 N. E. Rep'r, 71.

7. **Proof of rules — knowledge of employee.**— Evidence of a rule of the company which was printed on its applications for employment, and was required to be signed by every applicant who obtained a position, and was supposed to be known to him, is inadmissible, in the absence of an offer to produce the writing itself, or to account for its absence, or to show that decedent had signed it, or that he knew of the existence of the writing or rule. *Missouri Pac. Ry. Co. v. Lamothe*, 76 Tex. 219; 13 S. W. Rep'r, 194.

8. **Not obligatory upon employees unless known to them.**— The rules of a railway company for the government of its employees are not obligatory as such upon those who are not aware of them, and to whom they have not been promulgated. *Central R. Co. v. Rylla*, 84 Ga. 420; 11 S. E. Rep'r, 499.

SOUTH JOPLIN LAND CO. V. CASE ET AL.

(Supreme Court of Missouri, Division No. 1, May 11, 1891.)

1. **CORPORATIONS. PROMOTERS. SECRET PROFITS.** A person who secures an option on a property with a view to organizing a corporation, and selling the property to it, and who, together with another person employed by him, forms the company, and places the stock on representations that the property cost \$2,000 more than it actually did, and also that certain notes would be included in the sale, but after the company is organized informs the stockholders that the notes were not included, though they were received by himself, is accountable to the corporation for the profits thus realized by himself, as he occupied a position of trust toward the subscribers and could not make secret profits out of the transaction.

2. **PRACTICE. AMENDMENTS.** Though it is the proper practice, as prescribed by the Revised Statutes of Missouri, 1879, sections 8576, 8577, to entirely rewrite a pleading when it is amended so as to make new averments, yet it constitutes no ground for reversal that the lower court allowed such an amendment to be made by way of interlineation.

A PPEAL from circuit court, Jasper county, M. G. McGregor, judge.

L. P. Cunningham and *Thos. Dolan* for appellants. *E. O. Brown, Galen, Spencer & Karner* and *Holmes & Krauthoff* for respondent.

BLACK, J. This is a suit in equity brought by the plaintiff corporation against George C. Case and F. M. Redburn, to recover the value of certain notes, amounting to \$2,060. During the trial the petition was amended so as to include a demand against Case alone for the further sum of \$2,000. There was a decree according to the prayer of the petition as amended. Dr. Carter, who resides at Carthage, owned three hundred and twenty acres of land adjoining Joplin. Part of the land had been laid off into an addition, and Carter had sold some of the lots, but he held notes for the deferred payments on the lots so sold. These notes were supposed to aggregate \$3,000 or \$4,000. In March, 1887, Carter gave Case a written option contract, by the terms of which he agreed to convey and transfer to Case the land and unsold lots, the notes and a right-of-way claim against a railroad company for the consideration of \$32,000, one-third cash, and the balance in deferred payments, to be secured by deed of trust on the land. The contract had thirty days to run, and, if not performed by Case within that time, he forfeited the \$500 paid at the date of the contract. Though this contract stated a consideration of \$32,000, it is shown beyond all doubt that Case was to pay only \$30,000 for all the property. When Case procured the contract he had in contemplation the organization of a corporation to take the property so purchased, and this was known to Carter; for he then agreed to take two shares of stock, if the stock should not all be taken by other persons. In April, and a few days before the option contract expired, Case employed the defendant Redburn to organize a corporation, with a stock of thirty-two shares, of \$1,000 each, for the purpose of taking the property of Carter. Joplin then enjoyed what is commonly called a "boom," and Redburn succeeded in placing all the stock in an informal way in one day, reserving to himself and to Case each a share. Redburn represented to the persons agreeing to take the stock that the price to be paid Carter was \$32,000, and that the proposed company would get the land, unsold lots, and the notes held by Carter, amounting, he said, to \$3,000 or \$4,000 and also the claim for right-of-way; and it was on these representations that the parties agreed to take the stock. Most of the persons agreeing to take stock knew that Redburn represented Case, and that Case held the option. Some of them did not know, at

that time, that Case had any thing to do with the matter. Case resided in Joplin, and was perfectly cognizant of all that Redburn had done, and of the representations that he had made. The evidence of Redburn and Case is to the effect that on the next day Case told Redburn the notes would not go in, and he must go and notify the parties to that effect. Case says he did not give Redburn authority to say the notes would be turned over to the company, and Redburn gives us to understand that he misunderstood Case's directions in that respect. Redburn says he did then notify some of the parties that the notes and right-of-way claim would not go in as part of the sale. There is a uniformity of statement on the part of the persons who agreed to take stock that they were not informed that the notes would not be included until after the articles of association had been signed, and they had paid for their stock. Our conclusion from the evidence is that this notice that the notes were not to go in the transaction with the company was an after-thought on the part of Case, brought about by the fact that the stock commanded a premium. In a day or so after the stock had been thus informally placed, many of the stockholders met, signed articles of association, formally subscribed for stock, and paid their subscriptions. Directors were then elected, Redburn being one of them, and he was also made secretary. He and Case each took one share of stock. In a few days after this the board met to close up the transaction. The evidence shows beyond doubt that on this occasion Redburn representing Case, said the company would not get the notes. Mr. McClelland, who was president and the largest stockholder, objected, so that the project was about to be abandoned. Redburn, however, stated that he had been mistaken, and that Carter would not let the notes go in as part of the sale by him; that the time was close at hand when the option contract expired; and that Case would lose his \$500, unless the matter was closed up at once. On these representations the directors finally concluded to take the land and unsold lots without the notes. On the same day a deed of trust to Carter was executed, and the directors constituted Redburn an agent to close up the transaction with Carter. Redburn and Case went to Carthage on the same day, and the deeds were duly delivered. Redburn gave Carter checks for one-third of \$32,000, one of which was for the

sum of \$2,500. Carter handed his check to Case in payment of the \$500 held as a deposit, and the extra \$2,000, included in the consideration stated in the option contract. Carter says he received this check, and then gave it to Case, because Case wanted to make it appear the land had been sold for \$32,000. Carter at the same time gave Case the notes representing lots sold, but it appears they only amounted to \$2,060. Case and Redburn then repaired to a hotel, when Case gave Redburn a paper transferring to Redburn a one-third interest in the notes. He also gave Redburn a check for \$666.66. Case says he agreed to pay Redburn \$1,000 to organize the company and complete the transaction, but at the hotel they agreed upon \$666.66 and one-third of the notes as the compensation to Redburn. A month or so after these transactions McClelland became suspicious, and then asked Case if he got the notes from Carter, and Case said he did not. McClelland at once went to Carter, and learned that Case did get the notes. It appeared for the first time on the trial of this case that Case received the \$2,000, and the petition was then amended so as to include that demand against him.

A matter much controverted here and in the trial court is as to what relation Case and Redburn sustained toward the plaintiff corporation. The plaintiff insists that their relation to the company was one of confidence and trust, while the defendants say they were strangers, and had a right to deal with the persons taking stock and the corporation at arms-length. This issue is one of importance in this case, as it now stands, since this is a suit in equity, and the petition proceeds upon the plaintiff's theory just outlined. Persons who take an active part in procuring subscriptions, and in organizing a corporation or company, called "promoters," occupy a position often difficult to define. When the owner of the property deals with these promoters, representing himself only, and they the proposed corporation, it is very clear he occupies no position of trust or agency. He may deal at arms-length, as in other cases, being liable, however, for his fraudulent conduct. But it is common practice for persons who own property, or who have acquired the right to purchase property, to project and form a corporation, and induce others to become stockholders for the purpose of selling the property to the corporation at a profit. There is no rule of law which prohibits such a trans-

action, and there should be none, for the law encourages a free alienation and transfer of property, both real and personal; nor does the mere fact that a profit is made in such a transaction render the party receiving it liable to account therefor. But the persons who thus project and form a corporation, by soliciting and procuring others to subscribe for and take shares of stock, for the purpose of selling or turning over to the company property which they own, or have a right to acquire by executory contract, do occupy a double position. On the one hand, they represent their own interest in respect of the disposition of the property; on the other, they represent the proposed corporation. And persons who subscribe for stock have a right to do so upon the assumption that the promoters are using their knowledge, skill and ability for the benefit of the company. It is, therefore, clear on principle that promoters, under the circumstances just stated, do occupy a position of trust and confidence, and it devolves upon them to make full disclosure.

Thus it was said in the case of *Phosphate Co. v. Erlanger*, 5 Oh. Div. 73-119: "A promoter is, according to my view of the case, in a fiduciary relation to the company which he promotes or causes to come into existence. If that promoter has a property to sell to the company, it is quite open to him to do so; but upon him, as upon any other person in a fiduciary position, it is incumbent to make full and fair disclosure of his interest and position with respect to the property. I can see no difference in this respect between a promoter and a trustee, steward or agent." So it has been said in this country: The second principle is that where persons form such an association, or begin or start the project of one, from that time they do stand in a confidential relation to each other, and to all others who may subsequently become members or subscribers; and it is not competent for any of them to purchase property for the purpose of such a company, and then sell it at an advance without a full disclosure of the facts. They must account to the company for the profits, because it legitimately is theirs. *Oil Co. v. Densmore*, 64 Penn. St. 43-50. The position of trust and agency being once established, the duty to make full disclosure, and the liability to account for profits made without such disclosure, follows, as has often been asserted — a proposition not denied by counsel for defendants. *Bent v. Priest*, 86. Mo.

475; *Landis v. Saxton*, 89 Mo. 375; 1 S. W. Rep'r, 359. The point of most difficulty in this class of cases is as to the time when this fiduciary relation arises. As to this it has been well said: On the one hand, it is quite plain that a fiduciary relation between a promoter and a company may exist long before the actual formation of a company by registration or otherwise. On the other hand, it is obvious that something must be done beyond a purchase and resale to constitute such relation — something must, it is submitted, be done by the promoter to impose upon him the duty of protecting the interests of those who ultimately form the company. He assumes this duty if he assumes to act for them, or if he induces them to trust him, or to trust persons who are under his control, and who are practically himself in disguise. He also assumes such duty if he calls the company into existence in order that it may buy what he has to sell; but he does not assume such duty by negotiating with persons who have themselves assumed that duty, and who are in no way under his influence. 1 Lindl. Partn. (4th ed.) 584.

It remains to apply these principles to the case in hand. It is to be observed, in the first place, that Redburn was the agent of Case. We are also constrained to say that he was duly authorized by Case to make the representations which he did make to persons taking stock, and to the directors after the company had been organized. His acts and representations were the acts and representations of Case. Case had the undoubted right to make the option contract with Carter, and he was under no obligation to sell the property to any company. But it is a significant fact that he then contemplated the formation of a corporation, and had the consideration for the property stated to be \$32,000, while the true consideration was but \$30,000. He thereafter by his agent, assumed and took upon himself the duty of soliciting his neighbors to take stock, and of bringing the proposed corporation into existence for the express purpose of taking the property from himself. From that moment Case occupied a position of trust and confidence to the subscribers, and also to the proposed corporation, and it became his further duty to make full disclosures of profits which he intended to make in respect of the transfer of the property. This he did not do. On the contrary, he made breach of that duty in that he represented the purchase price

from Carter to be \$32,000, when it was but \$30,000; and in this, that he said Carter would not let the notes go in under the option contract; when in point of fact the notes were to be and were thereafter turned over to him. It, therefore, follows, from what has been said, that the \$2,000 and the notes belonged to the company, and the court was right in making the defendants account therefor.

It is argued that the directors finally consented to take the land and unsold lots at the price of \$32,000; that they got all they contracted for; and the company has no just ground of complaint. They did so consent, but it was upon the representation that \$32,000 was the true consideration paid Carter, and that the notes did not go to Case. For money and property acquired by Case under these untrue representations, occupying the position he did, he must account. What the company might have done had Case made full disclosure of his profits we cannot say, nor is it material to inquire. The argument made by defendants on this question is as bad in law as it is in morals. Redburn took his one-third interest in the notes with full knowledge of facts which made the notes the property of the company, and he, like Case, must account therefor.

It is insisted by the defendants that the court erred in allowing the plaintiff to amend the petition at the close of the evidence, so as to include the claim against Case for \$2,000. The point of the objection is that the amendment should not have been made by way of interlineation. It is the settled and approved practice to make minor amendments by way of interlineation and erasure, such as adding or striking out the name of a party, correcting dates and obvious errors. But where, as here, new averments are made for the purpose of introducing a new claim or demand, the pleading should be rewritten, and should set forth all the matter, leaving the abandoned pleading undefaced. In the present case several clauses were inserted, and the petition should have been re-written. This is the rule of the Code of Civil Procedure, sections 3576, 3577, Revised Statutes 1879. But, after all, the question whether the particular amendment may be made by interlineation is one resting largely in the discretion of the trial court. The fact that the amendment was made in this case by interlineation, when it should have been by filing a new and complete pe-

tion, constitutes no ground for reversing the decree. The judgment is, therefore, affirmed. The other judges concur.

Rehearing denied.*

Corporations — promoters — Liability for secret profits in sale of property to corporation. — *Brewster v. Hatch*, 122 N. Y. 348; 3 Am. R. R. & Corp. Rep. 481, is an instructive case upon this subject. Promoters occupy a trust relation to the corporation and its stockholders. So of directors and officers. As to transactions between the latter and the corporation, see *Richardson's Executors v. Green*, 1 Am. R. R. & Corp. Rep. 341; *Mason v. Pewabic Min. Co.*, 1 Am. R. R. & Corp. Rep. 227; *San Francisco Water Co. v. Patton*, 3 Am. R. R. & Corp. Rep. 558, and note.

GLEBBON V. VIRGINIA MIDLAND R. CO.

(Supreme Court of the United States, May 11, 1884.)

1. **CARRIERS. INJURY TO PASSENGER. LAND-SLIDE. ACT OF GOD.** A landslide in a railway cut, which results from the loosening of the earth in its sides by a fall of rain which is not of unusual violence, is not such an occurrence as is embraced in the phrase "act of God."

2. A railroad company which maintains a cut with sides in such a condition that a land-slide of this character occurs therein is guilty of negligence, though the immediate cause of the accident was vibration produced by a train passing through the cut.

3. **NEGLECT.** WHEN ACCIDENT IS PRIMA FACIE EVIDENCE OF. In an action against a railroad company for injuries to a passenger where an instruction is given for defendant that the burden of proof is on plaintiff to show negligence from which his injury resulted, it is error to refuse to modify the instruction by adding that the injury itself, if plaintiff was in the exercise of ordinary care, is *prima facie* evidence of negligence.

IN ERROR to the supreme court of the District of Columbia. This is an action for damages, brought in the supreme court of the District of Columbia. It appears from the bill of exceptions that at the trial the evidence introduced by the plaintiff tended to show that in January, 1882, he was a railway postal-clerk, in the service of the United States post-office department; that on Sunday, the 15th of that month, in the discharge of his official duty, he was making the run from Washington to Danville, Va., in a postal-car of the defendant, and over its road; that in the course of such run the train was in part derailed by a land-slide which occurred in a railway cut, and the postal-car in which

* Reported in 16 S. W. Rep'r, 880.

the plaintiff was at work was thrown from the track upon the tender, killing the engineer and seriously injuring the fireman; and that the plaintiff, while thus engaged in performing his duty, was thrown violently forward by the force of the collision, striking against a stove and letter-box, three of his ribs being broken, and his head on the left side contused, which injuries are claimed to have permanently impaired his physical strength, weakened his mind, and led to his dismissal from his office, because of his inability to discharge its duties. Defense was made by the company under these propositions: That the land-slide was caused by a rain which had fallen a few hours previous, and, therefore, was the act of God; that it was a sudden slide, caused by the vibration of the train itself, and which, therefore, the company was not chargeable with, since it had, two hours before, ascertained that the track was clear; and that the injury resulted from the plaintiff's being thrown against the postal-car's letter-box, for which the company was not responsible, since he took the risk incident to his employment. At the close of the testimony, the court, having given to the jury certain instructions in accordance with the requests of the plaintiff, charged the jury, at defendant's request, as follows:

"(1) The burden of proof is on the plaintiff to show that the defendant was negligent, and that its negligence caused the injury. (2) The jury are instructed that the plaintiff, when he took the position of a postal-clerk on the railroad, assumed the risk and hazard attached to the position, and if, in the discharge of his duties as such, he was injured through the devices in and about the car in which he was riding, properly constructed for the purpose of transporting the mails, the railroad is not liable for such injury, unless the same was caused by the negligent conduct of the company or its employes. (3) The court instructs the jury that, while a large degree of caution is exacted generally from railway companies in order to avert accidents, the caution applies only to those accidents which could be prevented or averted by human care and foresight, and not to accidents occurring solely from the act of God. If they believe that the track and instruments of the defendant were in good order, its officers sufficient in number and competent, and that the accident did not result from any deficiency in any of these requirements, but from a slide of earth

caused by recent rains, and that the agents and servants of the company had good reason to believe that there was no such obstruction in its track, and that they could not, by exercise of great care and diligence, have discovered it in time to avert the accident, then they should find for the defendant. (4) If the jury believe from the evidence that the defendant's instruments, human and physical, were suitable and qualified for the business in which it was engaged; that the accident complained of was caused by the shaking down of earth which had been loosened by the recent rains, and that the earth was shaken down by the passing of this train, then the accident was not such an act of negligence for which the defendant would be responsible, and the jury should find for the defendant." The counsel for the plaintiff objected to the granting of the first of these prayers, and asked the court to modify it by adding the words "but that the injury to the plaintiff upon the car of the defendant, if the plaintiff was in the exercise of ordinary care, is *prima facie* evidence of the company's liability." But the court refused to modify the said prayer, and the plaintiff duly and severally excepted to the granting of each one of said prayers on behalf of the defendant, and to the refusal of the court to modify the said first prayer, as requested. The jury, so instructed, found for the defendant, and judgment was rendered accordingly. That judgment having been affirmed by the court in general term (5 Mackey, 356), this writ of error was taken.

I. H. Ford and *Guion Miller* for plaintiff in error. *Linden Kent* for defendant in error.

LAMAR, J., after stating the facts as above, delivered the opinion of the court.

It will be most convenient in the decision of this case to consider the third instruction first. The objections made to it are three: (1) "It assumes that the accident was caused by an act of God, in the sense in which that term is technically used." It appears that the accident was caused by a land-slide, which occurred in a cut some fifteen or twenty feet deep. The defendant gave evidence tending to prove that rain had fallen on the afternoon of Friday and on the Saturday morning previous; and the claim is that the slide was produced by the loosening of the earth by

the rain. We do not think such an ordinary occurrence is embraced by the technical phrase "an act of God." There was no evidence that the rain was of extraordinary character, or that any extraordinary results followed it. It was a common, natural event; such as not only might have been foreseen as probable, but also must have been foreknown as certain to come. Against such an event it was the duty of the company to have guarded. Extraordinary floods, storms of unusual violence, sudden tempests, severe frosts, great droughts, lightnings, earthquakes, sudden deaths and illnesses, have been held to be "acts of God;" but we know of no instance in which a rain of not unusual violence, and the probable results thereof in softening the superficial earth, have been so considered. In *Dorman v. Ames*, 12 Minn. 451 (Gil. 347), it was held that a man is negligent if he fail to take precautions against such rises of high waters as are usual and ordinary, and reasonably to be anticipated at certain seasons of the year; and we think the same principle applies to this case. *Ewart v. Street*, 2 Bailey, 157, 162; *Moffat v. Strong*, 10 Johns. 11; *Steamboat Co. v. Tiers*, 24 N. J. Law, 697; *Railway Co. v. Braid*, 1 Moore P. C. (N. S.) 101. (2) The instruction does not hold the defendant "responsible for the condition of the sides of the cut made by it in the construction of the road, the giving way of which caused the accident." We think this objection is also well taken. The railroad cut is as much a part of the railroad structure as is the fill. They are both necessary, and both are intended for one result, which is the production of a level track, over which the trains may be propelled. The cut is made by the company no less than the fill; and the banks are not the result of natural causes, but of the direct intervention of the company's work. If it be the duty of the company (as it unquestionably is) in the erection of the fills and the necessary bridges to so construct them that they shall be reasonably safe, and to maintain them in a reasonably safe condition, no reason can be assigned why the same duty should not exist in regard to the cuts. Just as surely as the laws of gravity will cause a heavy train to fall through a defective or rotten bridge to the destruction of life, just so surely will those same laws cause land-slides and consequent dangerous obstructions to the track itself from ill-constructed railway cuts. To all intents and purposes a railroad track which

runs through a cut where the banks are so near and so steep that the usual laws of gravity will bring upon the track the *debris* created by the erosion processes of nature is overhung by those banks. Ordinary skill would enable the engineers to foresee the result, and ordinary prudence should lead the company to guard against it. To hold any other view would be to overbalance the priceless lives of the travelling public by a mere item of increased expense in the construction of railroads; and after all, an item, in the great number of cases, of no great moment.

In a late case in the queen's bench division — *Tarry v. Ashton*, 1 Q. B. Div. 314 — two out of three judges declared in substance that a man who, for his own benefit, suspends an object, or permits it to be suspended, over the highway, and puts the public safety in peril thereby, is under an absolute duty to keep it in such a state as not to be dangerous. The facts of the case were these: The defendant became the lessee and occupier of a house from the front of which a heavy lamp projected several feet over the public foot pavement. As the plaintiff was walking along in November, the lamp fell on her, and injured her. It appeared that in the previous August the defendant employed an experienced gas-fitter to put the lamp in repair. At the time of the accident a person employed by defendant was blowing the water out of the gas-pipes of the lamp, and in doing this a ladder was raised against the lamp-iron, or bracket, from which the lamp hung; and on the man mounting the ladder, owing to the wind and wet, the ladder slipped, and he, to save himself, clung to the lamp-iron, and the shaking caused the lamp to fall. On examination, it was discovered that the fastening by which the lamp was attached to the lamp-iron was in a decayed state. The jury found that there had been negligence on the part of the defendant personally; that the lamp was out of repair through general decay, but not to the knowledge of the defendant; that the immediate cause of the fall of the lamp was the slipping of the ladder; but that, if the lamp had been in good repair, the slipping of the ladder would not have caused the fall. Upon this it was held by Lush and Quain, JJ., that the plaintiff was entitled to a verdict on the ground that if a person maintains a lamp projecting over the highway for his own purposes, it is his duty to maintain it so as not be dangerous to persons passing by; and if it causes in-

juries, owing to a want of repair, it is no answer on his part that he had employed a competent man to repair it. 1 Thomp. Neg. 346, 347. The case of *Kearney v. Railroad Co.*, L. R., 6 Q. B. 759, 762 (in the exchequer chamber), cited in the brief of counsel for plaintiff in error, is directly in point. In that case the plaintiff had been injured while walking along a public highway, by a brick which fell from a pier of the defendant's bridge. A train had just passed, and the counsel for the defendant submitted that there was no evidence of negligence. The court (Kelly, Chief Baron) says: "There can be no doubt that it was the duty of the defendants, who had built this bridge over the highway, to take such care that, where danger can be reasonably avoided, the safety of the public using the highway should be provided for. The question, therefore, is whether there was any evidence of negligence on the part of the defendants; and by that we all understand such an amount of evidence as to fairly and reasonably support the finding of the jury.

The lord chief justice, in his judgment in the court below, said *res ipsa loquitur*, and I cannot do better than to refer to that judgment. It appears without contradiction that a brick fell out of a pier of the bridge without any assignable cause except the slight vibration caused by a passing train. This, we think, is not only evidence, but conclusive evidence, that it was loose; for otherwise so slight a vibration could not have struck it out of its place. * * * The bridge had been built two or three years, and it was the duty of the defendants from time to time to inspect the bridge, and ascertain that the brick-work was in good order, and all the bricks well secured." The principle of these decisions seem to us to be applicable to this case. If such be the law as to persons who, for their own purposes, cause projections to overhang the highway not constructed by them, *a fortiori* must it be the law as to those who, for their own purposes of profit, undertake to construct the highway itself, and to keep it serviceable and safe, yet who allow it to be practically overhung, from considerations of economy or through negligence. We think the case of *Railroad Co. v. Sanger*, 15 Gratt. 237, to which we are referred by counsel for plaintiff in error, is strongly illustrative of the principle in this case, to which it bears a close resemblance. Some rocks had been piled up along-side of the track for the pur-

piece of ballast, and some of them got upon the track, causing the injury. In rendering its opinion the court says: "Committing to themselves the responsibility as well of the road as of the cars and locomotives, they are bound to the most exact care and diligence, not only in the management of the trains and cars, but also in the structure and care of the track, and in the subsidiary arrangements necessary to the safety of the passengers. And, as accidents as frequently arise from obstructions on the track as perhaps from any other cause whatever, it would seem to follow, of course, that there is on the part of the officers of a railroad company more clearly enjoined within its warranty to carry their passengers safely, as far as human care and foresight will go, than the duty of employing the utmost care and diligence in guarding their road against such obstructions." See *Ke. M. & N. v. Railroad Corp.*, 4 Cosh. 49; *Howell, Carr.*, p. 194; *Bennett v. Railroad Co.*, 119 U. S. 577. This view of the obligation of the company of course makes it immaterial that the hole was suddenly caused by the vibration of the train itself. It is not a question of negligence in failing to remove the obstruction, but of negligence in allowing it to get there.

We are also of the opinion that it was error to refuse to modify the first instruction for the defendant as requested by the plaintiff. Since the decision in *Stokes v. Shivers*, 11 Fed. 151, and *Railroad Co. v. P. & M.*, 29 Wm. 341, it has been settled law in this court that the happening of an injurious accident is, in passenger cases, prima facie evidence of negligence on the part of the carrier, and that the passenger being himself in the exercise of due care the burden then rests upon the carrier to show that its whole duty was performed, and that the injury was unavoidable by human foresight. The rule announced in those cases has received general assent, and was followed at the present term in *Coasting Co. v. Tilton*, 139 U. S. —. The defendant seeks to uphold the action of the court in refusing the modification prayed for, by distinguishing the case at bar. It attempts to make two distinctions: (1) That the operation of the rule is confined to cases where the accident results from any defective arrangements, mismanagement or misconstruction of things over which the defendant has immediate control, and for the management, service and construction of which it is respon-

sible, or where the accident results from any omission or commission on the part of the railroad company with respect to these matters entirely under its control." (2) That the injury from an act of God is established as a fact, wherefore the presumption of negligence from the occurrence of the accident cannot arise. Neither of these attempted distinctions is sound, since, as has been shown, the defect was in the construction of that over which the defendant did have control, and for which it was responsible and since the slide was not caused by the act of God, in any admissible sense of that phrase. Moreover, if these distinctions were sound, still, as a matter of correct practice, the modification should have been made. The law is that the plaintiff must show negligence in the defendant. This is done *prima facie* by showing, if the plaintiff be a passenger, that the accident occurred. If that accident was in fact the result of causes beyond the defendant's responsibility, or of the act of God, it is still none the less true, that the plaintiff has made out his *prima facie* case. When he proves the occurrence of the accident the defendant must answer that case from all the circumstances of exculpation, whether disclosed by the one party or the other. They are its matter of defense. And it is for the jury to say, in the light of all the testimony, and under the instructions of the court, whether the relation of cause and effect did exist, as claimed by the defense, between the accident and the alleged exonerating circumstances. But when the court refuses to so frame the instructions as to present the rule in respect to the *prima facie* case, and so refuses on either of the grounds by which the refusal is sought to be supported herein, it leaves the jury without instructions to which they are entitled to aid them in determining what were the facts and causes of the accident, and how far those facts were or were not within the control of the defendant. This is error. Judgment reversed, and cause remanded, with direction to order a new trial, and to take further proceedings not inconsistent with this opinion.

Brewer, J., dissented from the opinion and judgment in this case on the ground that it is in contravention of the long-established rules as to what may be considered on an incomplete record.*

* Reported in 11 Sup. Ct. Rep'r, 860.

Railroad companies — injuries to passengers — care of road-bed — wash-outs.— In an action against a railroad company for injuries to a passenger occasioned by a washout at a culvert, the fact that the culvert would not have given way but for the breaking of a dam on adjoining property over which the company had no control, will not prevent recovery, if the negligent manner in which the culvert was constructed contributed to the accident. *Bonner v. Wingate*, 78 Tex. 353; 14 S. W. Rep'r, 790. In a similar case where a break in the track resulted from a flow of water in a rain-storm, it was held that a verdict for the plaintiff would not be disturbed when the evidence was conflicting as to whether the rainfall was unusually great. *Texas, etc., R. Co. v. Barron*, 78 Tex. 421; 14 S. W. Rep'r, 698.

DENVER, T. & G. R. Co. v. SIMPSON.

(Supreme Court of Colorado, March 20, 1891).

1. **RAILROAD COMPANIES. INJURY TO BRAKEMAN WHILE COUPLING CARS.** A brakeman who has his hand crushed while attempting to couple in the dark two cars with draw-heads, at an unequal height from the track, can recover for his injuries, where the company had failed to furnish suitable links for such couplings, and the conductor ordered plaintiff to take the unsuitable link with which he attempted to make the coupling.

2. **EVIDENCE.** Where the petition avers that the company failed to furnish a sufficient number of safe links, and that the accident resulted from that cause, evidence that the train was not properly supplied with suitable links for the run on which the accident occurred is admissible.

A PPEAL from district court, Arapahoe county. The plaintiff's cause of action, as stated in his complaint, omitting the formal allegation, is as follows: "The plaintiff on the 20th day of December, 1887, in the county of El Paso and state of Colorado, and at the time of the injuries complained of, was in the employ of the said defendant as brakeman, and was engaged at said Franceville Junction, in said county, in coupling freight-cars for the said defendant, as by the nature and terms of his employment he was required to do; and that it then and there became and was the duty of said defendant to procure good, safe and secure apparatus, links, link-pins and draw-bars to be used in coupling its said cars; that, by and through the carelessness, negligence and default of the said defendant and its servants, it failed to furnish a sufficient number of good, safe, secure links and link-pins for coupling its cars aforesaid; and also it provided, used and suffered to be used, unsafe, defective and insufficient links

and link-pins for coupling said cars as aforesaid, of which it had notice.

"Fourth. That by the want of due care and attention to its duty in that behalf toward said plaintiff on the 20th day of December, A. D. 1887, and while the said freight-cars and appliances aforesaid were in the use and service of the said defendant, and while the said plaintiff was engaged in coupling the same in his capacity as aforesaid for the defendant, a link was provided by said defendant for the purpose of coupling as aforesaid, and which was being used and handled by plaintiff in his capacity as aforesaid. This link, by reason of its unsafeness, defectiveness and insecurity, failed to act and operate in the coupling of said cars, and while the plaintiff, with all due care and diligence, was then and there using the same, for the purpose of coupling said cars for the defendant, and by reason of which, and by means whereof, then and there said cars came violently and forcibly into contact, while plaintiff in his capacity aforesaid was endeavoring to couple the same, by means whereof plaintiff's right hand was crushed and mangled, and he was otherwise greatly bruised, hurt and wounded. By means of the premises plaintiff became sick and disordered, and suffered great and intense pain, and so remained for a long space of time; and suffered the loss of the index finger from his right hand by amputation, as a result of said crushing and mangling as aforesaid; and also lost the use of the middle finger of his right hand by the crushing and mangling of the flesh and bone of the same; and was then and there deprived of the use of said right hand, and is now deprived of the use of the same; and that, as he is informed and believes, he will never be able to use said right hand again, to the damage of the plaintiff in the sum of \$10,000. Wherefore plaintiff prays judgment for the sum of \$10,000." The answer of defendant admits the injury to said plaintiff as in the complaint set forth, but denies that the same is due to any default of the said defendant, or its servants or agents. All other allegations of the complaint are denied. A trial was had to a jury, resulting in a verdict and judgment for plaintiff, from which judgment this appeal is prosecuted.

Wells, McNeal & Taylor and *Teller & Orahood* for appellant.
J. B. Belford and *T. C. Early* for appellee.

HAYT, J. (after stating the facts as above). In the court below appellee, as plaintiff, obtained judgment for the sum of \$800, for bodily injuries sustained by him while in the employ of appellant in the capacity of brakeman upon its railroad. It is shown by the record that at the time of the accident appellant was operating a line of railroad in this state between the cities of Denver and Pueblo; that appellee was in its employ as brakeman on one of its freight trains running between said points; that upon the morning of the day of the accident the train upon which appellee was employed left the city of Denver going south upon schedule time; that said train was not then properly supplied with links with which to make the couplings necessary to be made upon the contemplated run; that appellee endeavored to provide the train with the requisite number of links before starting from the city of Denver, but was prevented from so doing by reason of the negligence of appellant in failing to furnish such links. About eight o'clock upon the evening of said day appellee, in his capacity as brakeman, was required to make a coupling at Franceville Junction, upon the line of said railroad. In making that coupling appellee sustained the injury for which damages were recovered in the court below. The facts attending the accident are practically undisputed, the witnesses introduced by the plaintiff agreeing as to all material particulars, while the only attempt made to overthrow this testimony rests upon evidence of admissions claimed to have been made by the plaintiff to other employees of the company shortly after the accident. By such evidence contributory negligence on the part of appellee was attempted to be established. It is shown that the draw-heads of the two cars which appellee was required to couple were of unequal heights above the tracks, making the coupling somewhat difficult. The night was dark, cold and stormy; the supply of links furnished the train by the company was exhausted; none remained with which to make this coupling. In this extremity, and as the train was coming down the side track to the cars to be joined with it, appellee was searching about the tracks to find a link with which to make this necessary coupling. At this juncture the conductor in charge of the train ordered him to take a link laying upon the ground near the side track, and make the coupling with it. The accident occurred while appellee was endeavoring to execute this

command. The link pointed out by the conductor not being a suitable one with which to make the coupling, it caused appellee's hand to be crushed between the cars. As described by the witnesses upon the stand, it was a bent link, as distinguished from a crooked link; a crooked link being one crooked in a particular way for the purpose of making couplings in cases where the draw-heads of the cars to be connected are of different elevations above the track, while a bent link is one that has become misshapen by use. In view of the evidence, the verdict of the jury in favor of appellee cannot be disturbed. He was acting at the time under the immediate direction of his superior, the conductor, who had charge of the train, and of the brakemen employed thereon, including appellee. Appellee did not discover the defect in the link in time to avoid the accident. He could not well do so in the darkness. He was required to act promptly in making the coupling, without time for investigation or opportunity for reflection. Under the law he was only required to exercise such care as might reasonably be expected from a person of ordinary care and prudence in the situation in which plaintiff was then placed. In view of the facts, it cannot be said, as a matter of law, that he did not exercise reasonable care. On the other hand, the company is properly chargeable with negligence in failing to provide the train with a sufficient number of links in the first instance, and again in directing appellee to use the defective link. The duty of the master to supply the servant with suitable machinery and appliances for the work to be performed is universally recognized. *Railroad Co. v. Driscoll*, 12 Col. 520; 21 Pac. Rep'r, 708; *Wells v. Coe*, 9 Col. 159; 11 Pac. Rep'r, 50; *Hough v. Railway Co.*, 100 U. S. 213.

Some of the witnesses for appellant testified that soon after the accident appellee stated that the accident was caused by his glove sticking to the link, the glove being wet at the time. Evidence was introduced, however, to show that the accident was not so caused, and that if appellee made the statements attributed to him, he was in error in so doing. It was also in evidence that the glove was not wet, and that its use under the circumstances was reasonable and proper. All these matters, together with the law in relation to unavoidable accident and contributory negligence, was fully submitted to the jury under proper instructions.

The damages are not excessive, and we see no reason for disturbing the verdict. *Gilmore v. Railroad Co.*, 18 Fed. Rep'r, 866; *Railroad Co. v. Doyle*, 49 Tex. 190. In its essential features the case is entirely dissimilar from *Wells v. Coe*, supra, relied upon by appellant. In that case Coe, the party injured, was "foremen and boss of the workmen." His authority at the mine was plenary, save, perhaps, at such times as Wells might happen to be present. He had charge of the workmen and control of the machinery. By his orders the means provided to prevent just such accidents as the one causing the injury complained of were dispensed with, thereby making the accident possible, and it was rightfully held, under these circumstances, that he could not recover. It is contended that all evidence of the insufficiency of the supply of links upon the train was inadmissible under the pleadings. An examination of the complaint and answer shows that this was one of the matters directly put in issue; consequently the evidence was properly admitted.

The judgment will be affirmed.*

ACCIDENTS TO EMPLOYEES IN COUPLING CARS.

1. *Foot caught in unblocked switch — knowledge of defect.*— In an action against a railroad company for the death of a brakeman, caused by having his foot caught between the rails while uncoupling cars, it is error to charge that decedent's knowledge of the fact that the space between the main and guard-rails was unblocked was knowledge of the attendant danger, as that is a question for the jury. *Davis v. St. Louis, etc., R. Co.*, 58 Ark. 117; 13 S. W. Rep'r, 801. Notwithstanding the statute requiring all railroad companies to fill or block the frogs, switches and guard-rails, there can be no recovery for the death of a brakeman, who, while voluntarily attempting to uncouple moving cars, gets his foot caught in an unblocked "split switch," when it appears that he had been for several years in the employ of the company, was familiar with the switches and track where the accident occurred, had been warned by the written rules of the company, which he had read, not to enter between the cars in motion to couple or uncouple them, and had signed an acknowledgment when he became brakeman that he knew the duties were dangerous, and that he had read the rules by which he would be governed. *Grand v. Michigan Cent. R. Co.*, 83 Mich. 564; 47 N. W. Rep'r, 837. See, also, *Seley v. Southern Pac. R. Co.*, 2 Am. R. R. & Corp. Rep. 151.

2. *Foot caught between ties or by rail splinters.*— In an action against a railroad company for personal injuries sustained by a car-coupler in its employ, the declaration alleged that, in making a coupling between a standing car and a switch-engine, it became necessary for plaintiff to step between the rails;

* Reported in 26 Pac. Rep'r, 339.

that, on attempting to follow the backward motion of the cars, he found that his left foot was held either by the cross-ties or the iron rail of the track, causing a car-wheel to run over the foot; that the cross-ties were placed too close together, and the spaces between them were not filled in; that the iron rails were old and worn, and had sharp prongs protruding from the inner edges; and that plaintiff was ignorant of these defects when he started to make the coupling. Held, that the declaration set forth a cause of action, it not affirmatively appearing from its face that plaintiff could have known of the defects in the track by the use of ordinary diligence. *Preston v. Central Railroad & Banking Co.*, 84 Ga. 588; 11 S. E. Rep'r, 148.

Plaintiff in attempting to uncouple cars, found the coupling-pin fastened, when he signaled to the engineer to stop the train, which was done. Being still unable to remove the pin, he asked the engineer to give him the slack. The train kept moving slightly, and, after moving along with it for ten or twelve feet, plaintiff succeeded in pulling out the pin, and, as he stepped out, the leg of his pants was caught by a "sliver" in the rail, causing a car-wheel to run over his foot. Held, that a verdict for plaintiff would not be set aside because of his negligence in stepping between moving cars. *Texas, etc., R. Co. v. Overheiser*, 76 Tex. 487; 18 S. W. Rep'r, 468.

3. Coupling with unsuitable link — contributory negligence. — The following cases sustain the principal case reported. In both a brakeman was required to couple cars whose draw-heads were of unequal height and with none but straight links to use. In both cases a judgment for plaintiff was affirmed. *Van Gent v. Chicago, etc., R. Co.*, 80 Iowa, 526; 45 N. W. Rep'r, 918; *St. Louis, etc., R. Co. v. Higgins*, 53 Ark. 458; 14 S. W. Rep'r, 653.

4. Projecting timbers — contributory negligence. — A brakeman was instantly killed while attempting to shackle cars from each of which sticks of lumber projected. It was daylight at the time; and the shackling might have been made safely by stooping down between the timbers, or by crossing over, and making it upon the other side of the car, from which no timber projected. Held, that he was not "in the exercise of due care and diligence at the time," within the meaning of those words as used in the statute, giving a right of action to the next of kin of an employe instantly killed as the result of the negligence of employer. *Lothrop v. Fitchburg R. Co.*, 150 Mass. 423; 23 N. E. Rep'r, 227. The same holding was made in case of a similar accident in *Boyle v. New York, etc., R. Co.*, 151 Mass. 102; 23 N. E. Rep'r, 827.

5. Foreign cars of unusual construction — liability of company using same. — A railroad company is liable to an inexperienced brakeman for injuries received while coupling foreign cars, the injury being caused by the unusual construction of the couplings, materially differing from those of its own cars, unless it has cautioned him against the danger. *Missouri Pac. Ry. Co. v. White*, 76 Tex. 102; 18 S. W. Rep'r, 65. To the same effect where the foreign car had a defective brake-beam and a brakeman was injured in coupling. *Missouri Pac. Ry. Co. v. Barber*, 44 Kans. 613; 24 Pac. Rep'r, 969.

6. Coupling with hands instead of coupling-sticks. — Plaintiff, in attempting to couple defendant's cars with his hands contrary to the known rules of the company, caught his foot in a hole between the cross-ties, outside the railing, falling forward, just as the cars came together. Held, that plaintiff was guilty of culpable negligence which was the proximate cause of his injury.

Pryor v. Louisville, etc., R. Co., 90 Ala. 32; 8 So. Rep'r, 55. That coupling with the hands, in violation of a rule requiring the use of coupling-sticks, is contributory negligence sufficient to defeat a recovery is also held in *Memphis, etc., R. Co. v. Askew*, 90 Ala. 5; 7 So. Rep'r, 823; *Louisville, etc., R. Co. v. Watson*, 90 Ala. 68; 8 So. Rep'r, 249.

7. *Coupling to moving train in violation of rules—effect of engineer's order.*—Where a brakeman, in violation of the rules of the company, undertakes to make a coupling to a moving train, and is injured, he cannot recover for the injury, and it is immaterial that he was ordered to make the coupling by the engineer of the train. *Railway Co. v. Smith*, 88 Tenn. 611; 14 S. W. Rep'r, 427. See, also, *Rebelsky v. Chicago, etc., R. Co.*, 79 Iowa, 55; 44 N. W. Rep'r, 536.

8. *Where accident is due to negligence in operating the train or engine.*—The fact that there was only one brakeman on a train of ten loaded cars, and that only one brake was applied while it was being let down a steep grade to make the coupling, in doing which plaintiff was injured, was sufficient evidence to go to the jury on the question of defendant's negligence. *Georgia Pac. Ry. Co. v. Propst*, 90 Ala. 1; 7 So. Rep'r, 635.

Defendant's engineer knew that the plaintiff, defendant's brakeman, had no stick to guide the link, that he must couple the cars with his hands, and that the cars were only twelve inches apart. It was within the engineer's power to move the engine back slowly, but he jerked the lever suddenly, causing the engine to "jump back a foot," thereby crushing plaintiff's hand. Held, that plaintiff was entitled to damages although he was guilty of such contributory negligence as would have been, in the absence of the engineer's wanton negligence, a complete defense. *Louisville, etc., R. Co. v. Watson*, 90 Ala. 68; 8 So. Rep'r, 249. The following are also cases in which the accident was due to the too sudden movement of the engine: *McKnight v. Chicago, etc., R. Co.*, 44 Minn. 141; 46 N. W. Rep'r, 294; *Neville v. Chicago & N. W. R. Co.*, 79 Iowa, 232.

9. *Conductor making coupling, whether he may recover for injury.*—Where, in an action for personal injuries, it appeared that plaintiff, a freight conductor, was injured while uncoupling cars, which was no part of his duty, and contrary to the company's rules, and that there was no pressing emergency for him to perform this duty at that time, it is not error to grant a new trial on the ground that the verdict is contrary to an instruction to find for defendant unless the jury found that there was a pressing emergency. *Kane v. Savannah, etc., R. Co.*, 85 Ga. 858; 11 S. E. Rep'r, 493. Whether a conductor is justified in attempting to make a coupling, depends upon the emergency, of which the jury are the judges. *Seley v. Southern Pac. Ry. Co.*, 2 Am. R. R. & Corp. Rep. 151.

PULLMAN'S PALACE-CAR CO. V. PENNSYLVANIA.

(Supreme Court of the United States, May 11, 1891.)

1. CONSTITUTIONAL LAW. TAXATION OF SLEEPING-CARS ENGAGED IN INTERSTATE TRAFFIC. Since a state has the right to tax personal property within its jurisdiction, even though it is employed in interstate commerce, a state tax on such proportion of the whole capital stock of a foreign sleeping-car company as the number of miles over which its cars are operated within the state bears to the whole number of miles over which its cars are operated, is valid and constitutional, though such cars run into, through and out of the state. Affirming 107 Penn. St. 156.

IN ERROR to the supreme court of the state of Pennsylvania. This was an action brought by the state of Pennsylvania against Pullman's Palace-Car Company, a corporation of Illinois, in the court of common pleas of the county of Dauphin in the state of Pennsylvania, to recover the amount of a tax settled by the auditor-general and approved by the treasurer of that state for the years 1870 to 1880, inclusive, on the defendant's capital stock, taking as the basis of assessment such proportion of its capital stock as the number of miles of railroad over which the cars were run by the defendant in Pennsylvania bore to the whole number of miles in this and other states over which its cars were run. All these taxes were levied under successive statutes of Pennsylvania, imposing taxes on capital stock of corporations incorporated by the laws of Pennsylvania or of any other state, and doing business in Pennsylvania, computed on a certain percentage of dividends made or declared. The taxes of 1870-1874 were levied under the statute of May 1, 1868, No. 69, section 5, which applied to corporations of every kind, with certain exceptions not material to this case; and fixed the amount of the tax at half a mill on every one per cent of dividend. P. L. 1868, p. 109. The taxes for 1875-1877 were levied under the statute of April 24, 1874, No. 31, section 4, which applied to all corporations in any way engaged in the transportation of freight or passengers, and fixed the tax at nine-tenths of a mill on every one per cent of dividend. P. L. 1874, p. 70. The taxes for 1878-1880 were levied under the statutes of March 20, 1877, No. 5, section 3, and of June 7, 1879, No. 122, section 4, applicable to all corporations, except building associations, banks, savings institutions and foreign insurance companies,

and fixing the tax at half a mill on each one per cent of dividend of six per cent or more on the par value of the capital stock, and, when the dividend was less, at three mills on a valuation of the capital stock. P. L. 1877, p. 8; P. L. 1879, p. 114.

A trial by jury was waived, and the case submitted to the decision of the court, which found the following facts: "The defendant is a corporation of the state of Illinois, having its principal office in Chicago. Its business was, during all the time for which tax is charged, to furnish sleeping-coaches and parlor and dining-room cars to the various railroad companies, with which it contracted on the following terms: The defendant furnished the coaches and cars, and the railroad companies attached and made them part of their trains, no charge being made by either party against the other. The railroad companies collected the usual fare from passengers who traveled in their coaches and cars, and the defendant collected a separate charge for the use of the seats, sleeping-berths and other conveniences.

"Business has been carried on continuously by the defendant in this way in Pennsylvania since February 17, 1870, and it has had about one hundred coaches and cars engaged in this way in the state during that time. The cars used in this state have, during all the time for which tax is charged, been running into, through, and out of this state." Upon these facts the court held "that the proportion of the capital stock of the defendant invested and used in Pennsylvania is taxable under these acts; and that the amount of the tax may be properly ascertained by taking as a basis the proportion which the number of miles operated by the defendant in this state bears to the whole number of miles operated by it, without regard to the question whether any particular car or cars were used," and, therefore, gave judgment for the state. That judgment was affirmed upon writ or error by the supreme court of the state, for reasons stated in its opinion as follows: "We think it very clear that the plaintiff in error is engaged in carrying on such a business within this commonwealth as to subject it to the statutes imposing taxation. While the tax on the capital stock of a company is a tax on its property and assets, yet the capital stock of a company and its property and assets are not identical. The coaches of the company are its property. They are operated within this state. They are daily passing from one

end of the state to the other. They are used in performing the functions for which the corporation was created. The fact that they also are operated in other states cannot wholly exempt them from taxation here. It reduces the value of the property in this state, justly subject to taxation here. This was recognized in the court below, and we think the proportion was fixed according to a just and equitable rule." 107 Penn. St. 156, 160. Pullman's Palace-Car Company sued out a writ of error from this court, and filed six assignments of error, the substance of which was summed up in the brief of its counsel as follows: "The court erred in holding that any part of the capital stock of the Pullman Company was subject to taxation by the state of Pennsylvania by reason of its running any of its cars into, out of or through the state of Pennsylvania in the course of their employment in the interstate transportation of railway passengers."

Edward Isham, John S. Runnells, Wm. Burry and M. E. Olmsted for plaintiff in error. *W. S. Kirkpatrick and J. F. Sanderson* for the commonwealth.

Mr. Justice GRAY, after stating the facts as above, delivered the opinion of the court.

Upon this writ of error, whether this tax was in accordance with the law of Pennsylvania is a question on which the decision of the highest court of the state is conclusive. The only question of which this court has jurisdiction is whether the tax was in violation of the clause of the constitution of the United States granting to congress the power to regulate commerce among the several states. The plaintiff in error contends that its cars could be taxed only in the state of Illinois, in which it was incorporated, and had its principal place of business. No general principles of law are better settled or more fundamental than that the legislative power of every state extends to all property within its borders, and that only so far as the comity of that state allows can such property be affected by the law of any other state. The old rule, expressed in the maxim *mobilia sequuntur personam*, by which personal property was regarded as subject to the law of the owner's domicile, grew up in the Middle Ages, when movable property consisted chiefly of gold and jewels, which could be easily carried by the owner from place to place, or secreted in spots known only to

himself. In modern times, since the great increase in amount and variety of personal property, not immediately connected with the person of the owner, that rule has yielded more and more to the *lex situs*, the law of the place where the property is kept and used. *Green v. Van Buskirk*, 5 Wall. 307, and 7 Wall. 139; *Hervey v. Locomotive Works*, 93 U. S. 664; *Harkness v. Russell*, 118 U. S. 663, 679; 7 Sup. Ct. Rep'r, 51; *Walworth v. Harris*, 129 U. S. 355; 9 Sup. Ct. Rep'r, 340; *Story Confl. Laws*, § 550; *Whart. Confl. Laws*, §§ 297-311. As observed by Mr. Justice Story, in his Commentaries just cited: "Although movables are for many purposes to be deemed to have no *situs* except that of the domicile of the owner, yet, this being but a legal fiction, it yields whenever it is necessary for the purpose of justice that the actual *situs* of the thing should be examined. A nation within whose territory any personal property is actually situate has an entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate there." For the purposes of taxation, as has been repeatedly affirmed by this court, personal property may be separated from its owner; and he may be taxed on its account at the place where it is, although not the place of his own domicile, and even if he is not a citizen or a resident of the state which imposes the tax. *Lane Co. v. Oregon*, 7 Wall. 71, 77; *Railroad Co. v. Pennsylvania*, 15 Wall. 300, 323, 324, 328; *Railroad Co. v. Peniston*, 18 Wall. 5, 29; *Tappan v. Bank*, 19 Wall. 490, 499; *State Railroad Tax Cases*, 92 U. S. 575, 607, 608; *Brown v. Houston*, 114 U. S. 622; 5 Sup. Ct. Rep'r, 1091; *Coe v. Errol*, 116 U. S. 517, 524; 6 Sup. Ct. Rep'r, 475; *Marye v. Railroad Co.*, 127 U. S. 117, 123; 8 Sup. Ct. Rep'r, 1037. It is equally well settled that there is nothing in the constitution or laws of the United States which prevents a state from taxing personal property employed in interstate or foreign commerce like other personal property within its jurisdiction. *Delaware Railroad Tax*, 18 Wall. 206, 232; *Telegraph Co. v. Texas*, 105 U. S. 460, 464; *Ferry Co. v. Pennsylvania*, 114 U. S. 196, 206, 211; 5 Sup. Ct. Rep'r, 826; *Telegraph Co. v. Attorney-General*, 125 U. S. 530, 549; 8 Sup. Ct. Rep'r, 961; *Marye v. Railroad Co.*, 127 U. S. 117, 124; 8 Sup. Ct. Rep'r, 1037; *Leloup v. Mobile*, 127 U. S. 640, 649; 8 Sup. Ct. Rep'r, 1330.

Ships or vessels, indeed, engaged in interstate or foreign commerce upon the high seas or other waters which are a common highway, and having their home port, at which they are registered under the laws of the United States at the domicile of their owners, in one state, are not subject to taxation in another state at whose ports they incidentally and temporarily touch for the purpose of delivering or receiving passengers or freight. But that is because they are not, in any proper sense, abiding within its limits, and have no continuous presence or actual *situs* within its jurisdiction, and, therefore, can be taxed only at their legal *situs* — their home port, and the domicile of their owners. *Hays v. Steamship Co.*, 17 How. 596; *St. Louis v. Ferry Co.*, 11 Wall. 423; *Morgan v. Parham*, 16 Wall. 471; *Ferry Co. v. East St. Louis*, 107 U. S. 365; 2 Sup. Ct. Rep'r, 257; *Ferry Co. v. Pennsylvania*, 114 U. S. 196; 5 Sup. Ct. Rep'r, 826. Between ships and vessels, having their *situs* fixed by act of congress, and their course over navigable waters, and touching land only incidentally and temporarily, and cars or vehicles of any kind, having no *situs* so fixed, and traversing the land only, the distinction is obvious. As has been said by this court: "Commerce on land between the different states is so strikingly dissimilar, in many respects, from commerce on water, that it is often difficult to regard them in the same aspect in reference to the respective constitutional powers and duties of the state and federal governments. No doubt commerce by water was principally in the minds of those who framed and adopted the constitution, although both its language and spirit embrace commerce by land as well. Maritime transportation requires no artificial road-way. Nature has prepared to hand that portion of the instrumentality employed. The navigable waters of the earth are recognized public highways of trade and intercourse. No franchise is needed to enable the navigator to use them. Again, the vehicles of commerce by water being instruments of intercommunication with other nations, the regulation of them is assumed by the national legislature. So that state interference with transportation by water, and especially by sea, is at once clearly marked and distinctly discernible. But it is different with transportation by land." *Railroad Co. v. Maryland*, 21 Wall. 456, 470.

In *Ferry Co. v. Pennsylvania*, on which the plaintiff in error

much relies, the New Jersey corporation taxed by the state of Pennsylvania, under one of the statutes now in question, had no property in Pennsylvania except a lease of a wharf at which its steamboats touched to land and receive passengers and freight carried across the Delaware river ; and the difference in the facts of that case and of this and in the rules applicable was clearly indicated in the opinion of the court as follows: "It is true that the property of corporations, engaged in foreign or interstate commerce, as well as the property of corporations engaged in other business, is subject to taxation, provided, always, it be within the jurisdiction of the state." 114 U. S. 206 ; 5 Sup. Ct. Rep'r, 829. "While it is conceded that the property in a state belonging to a foreign corporation engaged in foreign or interstate commerce may be taxed equally with like property of a domestic corporation engaged in that business, we are clear that a tax or other burden imposed on the property of either corporation because it is used to carry on that commerce, or upon the transportation of persons or property, or for the navigation of the public waters over which the transportation is made, is invalid and void as an interference with and an obstruction of the power of congress in the regulation of such commerce." 114 U. S. 211 ; 5 Sup. Ct. Rep'r, 832. Much reliance is also placed by the plaintiff in error upon the cases in which this court has decided that citizens or corporations of one state cannot be taxed by another state for a license or privilege to carry on interstate or foreign commerce within its limits. But in each of these cases the tax was not upon the property employed in the business, but upon the right to carry on the business at all, and was, therefore, held to impose a direct burden upon the commerce itself. *Moran v. New Orleans*, 112 U. S. 69, 74 ; 5 Sup. Ct. Rep'r, 38 ; *Pickard v. Car Co.*, 117 U. S. 34, 43 ; 6 Sup. Ct. Rep'r, 635 ; *Robbins v. Taxing Dist.*, 120 U. S. 489, 497 ; 7 Sup. Ct. Rep'r, 592 ; *Leloup v. Mobile*, 127 U. S. 640, 644 ; 8 Sup. Ct. Rep'r, 1380. For the same reason, a tax upon the gross receipts derived from the transportation of passengers and goods between one state and other states or foreign nations has been held to be invalid. *Fargo v. Michigan*, 121 U. S. 230 ; 7 Sup. Ct. Rep'r, 857 ; *Steamship Co. v. Pennsylvania*, 122 U. S. 326 ; 7 Sup. Ct. Rep'r, 1118.

The tax now in question is not a license tax or a privilege tax ;

it is not a tax on business or occupation; it is not a tax on or because of the transportation or the right of transit of persons or property through the state to other states or countries. The tax is imposed equally on corporations doing business within the state, whether domestic or foreign, and whether engaged in interstate commerce or not. The tax on the capital of the corporation on account of its property within the state is, in substance and effect, a tax on that property. *Ferry v. Pennsylvania*, 114 U. S. 196, 209; 5 Sup. Ct. Rep'r, 826; *Telegraph Co. v. Attorney-General*, 125 U. S. 530, 552; 8 Sup. Ct. Rep'r, 961. This is not only admitted, but insisted on, by the plaintiff in error.

The cars of this company within the state of Pennsylvania are employed in the interstate commerce; but their being so employed does not exempt them from taxation by the state; and the state has not taxed them because of their being so employed, but because of their being within its territory and jurisdiction. The cars were continuously and permanently employed in going to and fro upon certain routes of travel. If they had never passed beyond the limits of Pennsylvania, it could not be doubted that the state could tax them, like other property within its borders, notwithstanding they were employed in interstate commerce. The fact that, instead of stopping at the state boundary, they cross that boundary in going out and coming back, cannot affect the power of the state to levy a tax upon them. The state, having the right, for the purposes of taxation, to tax any personal property found within its jurisdiction, without regard to the place of the owner's domicile, could tax the specific cars which at a given moment were within its borders. The route over which the cars travel extending beyond the limits of the state, particular cars may not remain within the state; but the company has at all times substantially the same number of cars within the state, and continuously and constantly uses there a portion of its property; and it is distinctly found, as matter of fact, that the company continuously, throughout the periods for which these taxes were levied, carried on business in Pennsylvania, and had about one hundred cars within the state.

The mode which the state of Pennsylvania adopted to ascertain the proportion of the company's property upon which it should be taxed in that state was by taking as a basis of assessment such

proportion of the capital stock of the company as the number of miles over which it ran cars within the state bore to the whole number of miles in that and other states over which its cars were run. This was a just and equitable method of assessment; and, if it were adopted by all the states through which these cars ran, the company would be assessed upon the whole value of its capital stock, and no more. The validity of this mode of apportioning such a tax is sustained by several decisions of this court in cases which came up from the circuit courts of the United States, and in which, therefore, the jurisdiction of this court extended to the determination of the whole case, and was not limited, as upon writs of error to the state courts, to questions under the constitution and laws of the United States.

In the *State Railroad Tax Cases*, 92 U. S. 575, it was adjudged that a statute of Illinois, by which a tax on the entire taxable property of a railroad corporation, including its rolling stock, capital and franchise, was assessed by the state board of equalization, and was collected in each municipality in proportion to the length of the road within it, was lawful, and not in conflict with the constitution of the state; and Mr. Justice Miller, delivering judgment, said: "Another objection to the system of taxation by the state is that the rolling stock, capital stock and franchise are personal property, and that this, with all other personal property, has a local *situs* at the principal place of business of the corporation, and can be taxed by no other county, city or town but the one where it is so situated. This objection is based upon the general rule of law that personal property, as to its *situs*, follows the domicile of its owner. It may be doubted very reasonably whether such a rule can be applied to a railroad corporation as between the different localities embraced by its line of road. But, after all, the rule is merely the law of the state which recognizes it; and when it is called into operation as to property located in one state and owned by a resident of another, it is a rule of comity in the former state rather than an absolute principle in all cases. *Green v. Van Buskirk*, 5 Wall. 312. Like all other laws of a state, it is, therefore, subject to legislative repeal, modification or limitation; and when the legislature of Illinois declared that it should not prevail in assessing personal property of railroad companies for taxation, it simply exercised an ordinary function of

legislation." 92 U. S. 607, 608. "It is further objected that the railroad track, capital stock and franchise is not assessed in each county where it lies, according to its value there, but according to an aggregate value of the whole, on which each county, city and town collects taxes according to the length of the track within its limits." "It may well be doubted whether any better mode of determining the value of that portion of the track within any one county has been devised than to ascertain the value of the whole road, and apportion the value within the county by its relative length to the whole." "This court has expressly held in two cases, where the road of a corporation ran through different states, that a tax upon the income or franchise of the road was properly apportioned by taking the whole income or value of the franchise, and the length of the road within each state, as the basis of taxation. *Delaware Railroad Tax*, 18 Wall. 206; *Railroad Co. v. Pennsylvania*, 21 Wall. 492." 92 U. S. 608, 611. So in *Telegraph Co. v. Attorney-General*, 125 U. S. 530; 8 Sup. Ct. Rep'r, 961, this court upheld the validity of a tax imposed by the state of Massachusetts upon the capital stock of a telegraph company, on account of property owned and used by it within the state, taking as the basis of assessment such proportion of the value of its capital stock as the length of its lines within the state bore to their entire length throughout the country.

Even more in point is the case of *Marye v. Railroad Co.*, 127 U. S. 117; 8 Sup. Ct. Rep'r, 1037, in which the question was whether a railroad company incorporated by the state of Maryland, and no part of whose own railroad was within the state of Virginia, was taxable under general laws of Virginia upon rolling stock owned by the company and employed upon connecting railroads leased by it in that state, yet not assigned permanently to those roads, but used interchangeably upon them and upon roads in other states, as the company's necessities required. It was held not to be so taxable, solely because the tax laws of Virginia appeared upon their face to be limited to railroad corporations of that state; and Mr. Justice Matthews, delivering the unanimous judgment of the court, said: "It is not denied, as it cannot be, that the state of Virginia has rightful power to levy and collect a tax upon such property used and found within its territorial limits as this property was used and found, if and whenever it may

choose, by apt legislation, to exert its authority over the subject. It is quite true, as the *situs* of the Baltimore and Ohio Railroad Company is in the state of Maryland, that, also, upon general principles, is the *situs* of all its personal property; but for purposes of taxation, as well as for other purpose, that *situs* may be fixed in whatever locality the property may be brought and used by its owner by the law of the place where it is found. If the Baltimore and Ohio Railroad Company is permitted by the state of Virginia to bring into its territory, and there habitually to use and employ, a portion of its movable personal property, and the railroad company chooses so to do, it would certainly be competent and legitimate for the state to impose upon such property, thus used and employed, its fair share of the burdens of taxation imposed upon similar property used in the like way by its own citizens. And such a tax might be properly assessed and collected in cases like the present, where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business. In such cases the tax might be fixed by an appraisal and valuation of the average amount of the property thus habitually used, and collected by distraint upon any portion that might at any time be found. Of course, the lawfulness of a tax upon vehicles of transportation used by common carriers might have to be considered in particular instances with reference to its operation as a regulation of commerce among the states, but the mere fact that they were employed as vehicles of transportation in the interchange of interstate commerce would not render their taxation invalid." 127 U. S. 123, 124; 8 Sup. Ct. Rep'r, 1039, 1040. For these reasons, and upon these authorities, the court is of opinion that the tax in question is constitutional and valid. The result of holding otherwise would be that, if all the states should concur in abandoning the legal fiction that personal property has its *situs* at the owner's domicile, and in adopting the system of taxing it at the place at which it is used and by whose laws it is protected, property employed in any business requiring continuous and constant movement from one state to another would escape taxation altogether. Judgment affirmed.

Brown, J., not having been a member of the court when this case was argued, took no part in its decision.

BRADLEY, J. (with whom concurred Field and Harlan, JJ.), dissenting. I dissent from the judgment of the court in this case, and will state briefly my reasons. I concede that all property, personal as well as real, within a state, and belonging there, may be taxed by the state. Of that there can be no doubt. But where property does not belong in the state, another question arises. It is the question of the jurisdiction of the state over the property. It is stated in the opinion of the court as a fundamental proposition on which the opinion really turns that all personal as well as real property within a state is subject to the laws thereof. I conceive that that proposition is not maintainable as a general and absolute proposition. Among independent nations, it is true, persons and property within the territory of a nation are subject to its laws, and it is responsible to other nations for any injustice it may do to the persons or property of such other nations. This is a rule of international law. But the states of this government are not independent nations. There is such a thing as a constitution of the United States, and there is such a thing as a government of the United States, and there are many things, and many persons, and many articles of property that a state cannot lay the weight of its finger upon because it would be contrary to the constitution of the United States. Certainly, property merely carried through a state cannot be taxed by the state. Such a tax would be a duty — which a state cannot impose. If a drove of cattle is driven through Pennsylvania from Illinois to New York for the purpose of being sold in New York, while in Pennsylvania it may be subject to the police regulations of the state, but it is not subject to taxation there. It is not generally subject to the laws of the state, as other property is. So if a train of cars starts at Cincinnati for New York, and passes through Pennsylvania, it may be subject to the police regulations of that state while within it, but it would be repugnant to the constitution of the United States to tax it. We have decided this very question in the *Case of State Freight Tax*, 15 Wall. 232. The point was directly raised and decided that property on its passage through a state in the course of interstate commerce cannot be taxed by the state, because taxation is incidentally regulation, and a state cannot regulate interstate commerce. The same doctrine was recognized in *Coe v. Errol*, 116 U. S. 517; 6 Sup. Ct. Rep'r 475. And surely a state

cannot interfere with the officers of the United States in the performance of their duties, whether acting under the judicial, military, postal, or revenue departments. They are entirely free from state control. So a citizen of the United States, or any other person, in the performance of any duty, or in the exercise of any privilege, under the constitution or laws of the United States is absolutely free from state control in relation to such matters. So that the general proposition that all persons and personal property within a state are subject to the laws of the state, unless materially modified, cannot be true. But when personal property is permanently located within a state for the purpose of ordinary use or sale, then, indeed, it is subject to the laws of the state and to the burdens of taxation, as well when owned by persons residing out of the state as when owned by persons residing in the state. It has then acquired a *situs* in the state where it is found.

A man residing in New York may own a store, a factory, or a mine in Alabama, stocked with goods, utensils, or materials for sale or use in that state. There is no question that the *situs* of personal property so situated is in the state where it is found, and that it may be subjected to double taxation — in the state of the owner's residence, as a part of the general mass of his estate; and in the state of its *situs*. Although this is a consequence which often bears hardly on the owner, yet it is too firmly sanctioned by the law to be disturbed, and no remedy seems to exist but a sense of equity and justice in the legislatures of the several states. The rule would undoubtedly be more just if it made the property taxable, like lands and real estate, only in the place where it is permanently situated. Personal as well as real property may have a *situs* of its own, independent of the owner's residence, even when employed in interstate or foreign commerce. An office or warehouse connected with a steamship line or with a continental railway may be provided with furniture and all the apparatus and appliances usual in such establishments. Such property should be subject to the *lex rei sitæ* and to local taxation, though solely devoted to the purposes of the business of those lines. But the ships that traverse the sea, and the cars that traverse the land, in those lines, being the vehicles of commerce, interstate or foreign, and intended for its movement from one state or country to another, and having no fixed or permanent

situs or home except at the residence of the owner, cannot, without an invasion of the powers and duties of the federal government, be subject to the burdens of taxation in the places where they only go or come in the transaction of their business except where they belong. *Hays v. Steamship Co.*, 17 How. 596; *Morgan v. Parham*, 16 Wall. 471; *Transportation Co. v. Wheeling*, 99 U. S. 273. To contend that there is any difference between cars or trains of cars and ocean steamships in this regard is to lose sight of the essential qualities of things. This is a matter that does not depend upon the affirmative action of congress. The regulation of ships and vessels by act of congress does not make them the instruments of commerce. They would be equally so if no such affirmative regulations existed. For the states to interfere with them in either case would be to interfere with and to assume the exercise of that power which by the constitution has been surrendered by the states to the government of the United States, namely, the power to regulate commerce.

Reference is made in the opinion of the court to the case of *Railroad Co. v. Maryland*, 21 Wall. 456, in which it was said that commerce on land between the different states is strikingly dissimilar in many respects from commerce on water; but that was said in reference to the highways of transportation in the two cases, and the difference of control which the state has in one case from that which it can possibly have in the other. A railroad is laid on the soil of the state by virtue of authority granted by the state and constantly subject to the police jurisdiction of the state; while the sea and navigable rivers are highways created by nature, and not subject to state control. The question in that case related to the power of the state over its own corporation, in reference to its rate of fares and the remuneration it was required to pay to the state for its franchises — an entirely different question from that which arises in the present case. Reference is also made to expressions used in the opinion in *Ferry Co. v. Pennsylvania*, 114 U. S. 196; 5 Sup. Ct. Rep'r, 826, which, standing alone, would seem to concede the right of a state to tax foreign corporations engaged in foreign or interstate commerce if such property is within the jurisdiction of the state. But the old scope of that opinion is to show that neither the vehicles of commerce coming within the state nor the capital of such corporations is taxable

there, but only the property having a *situs* there — as the wharf used for landing passengers and freight. The entire series of decisions to that effect are cited and relied on. Of course I do not mean to say that either railroad cars or ships are to be free from taxation, but I do say that they are not taxable by those states in which they are only transiently present in the transaction of their commercial operations. A British ship coming to the harbor of New York from Liverpool ever so regularly, and spending half its time (when not on the ocean) in that harbor, cannot be taxed by the state of New York (harbor, pilotage and quarantine dues not being taxes). So New York ships plying regularly to the port of New Orleans so that one of the line may be always lying at the latter port, cannot be taxed by the state of Louisiana. Cases above cited. No more can a train of cars belonging in Pennsylvania, and running regularly from Philadelphia to New York or to Chicago, be taxed by the state of New York in the one case, or by Illinois in the other. If it may lawfully be taxed by these states, it may lawfully be taxed by all the intermediate states — New Jersey, Ohio and Indiana. And then we should have back again all the confusion and competition and state jealousies which existed before the adoption of the constitution, and for putting an end to which the constitution was adopted.

In the opinion of the court it is suggested that if all the states should adopt as equitable a rule of proportioning the taxes on the Pullman Company as that adopted by Pennsylvania a just system of taxation of the whole capital stock of the company would be the result. Yes, if —! But Illinois may tax the company on its whole capital stock. Where would be the equity then? This, however, is a consideration that cannot be compared with the question as to the power to tax at all — as to the relative power of the state and general governments over the regulation of internal commerce — as to the right of the states to resume those powers which have been vested in the government of the United States.

It seems to me that the real question in the present case is as to the *situs* of the cars in question. They are used in interstate commerce, between Pennsylvania, New York and the western states. Their legal *situs* no more depends on the states or places where they are carried in the course of their operations than would that of any steamboats employed by the Pennsylvania Railroad

Company to carry passengers on the Ohio or Mississippi. If such steamboats belonged to a company located at Chicago, and were changed from time to time, as their condition as to repairs and the convenience of the owners might render necessary, is it possible that the states in which they are running and landing in the exercise of interstate commerce could subject them to taxation? No one, I think, would contend this. It seems to me that the cars in question belonging to the Pullman Car Company are in precisely the same category.

The case of *Telegraph Co. v. Attorney-General*, 125 U. S. 530; 8 Sup. Ct. Rep'r, 961, is entirely different from the present. In that case there was no question as to the *situs* of the property taxed. It was situated within the state, consisting of poles, and wires, and offices, and a general plant for telegraphic purposes. The property belonged in Massachusetts, and was consequently taxable there. There was a phase of that case which led some of the justices of the court to doubt as to the proper decision to be made. The difficulty was this: The tax was, in terms, made upon a certain proportional part of the capital stock of the company. That proportion was regulated by the number of miles of telegraph within the state as compared with the number of miles of telegraph belonging to the company in the whole country. It was objected that the property of the company situated in Massachusetts had no necessary relation to the said proportion of the capital stock, because the aggregate value of the stock might depend on property, franchises and amount of business outside of Massachusetts, largely out of proportion to the miles of telegraph lines outside of that state. But the difficulty of getting at the true value of the property within the state, and of adopting any other rule for ascertaining it, as well as the failure of the company to show that the rule adopted produced any unfair results, finally induced an acquiescence in the decision, but expressly on the grounds that, though the tax was nominally on the shares of the capital stock of the company, it was in effect a tax upon the property owned and used by it in Massachusetts, the proportional length of the lines in that state to their entire length throughout the whole country being merely used as the basis for ascertaining the value of that property. The same difficulty as to the method of determining value exists in the present case which existed in that;

but the more serious difficulty lies in the question of the *situs* of the property, and the consequent jurisdiction of the state of Pennsylvania to tax it. It is not fast property. It does not consist of real estate. It does not attach itself to the land. It is movable, and engaged in interstate commerce, not in Pennsylvania alone, but in that and other states; and the question is, how can such property be taxed by a state to which it does not belong? It is indirectly but virtually taxing the passengers — many of them carried from New York to Chicago, or from Chicago to New York, and most of them from one state to another. It is clearly a burden on interstate commerce. The opinion of the court is based on the idea that the cars are taxable in Pennsylvania because a certain number continuously abide there. But how can they be said to abide there when they only stop at Philadelphia and other stations to take on passengers? And it is all the same whether they cross the state entirely, or run into or out of other states with a terminus in Pennsylvania. It is only by virtue of such of its property as is situated in Pennsylvania that the Pullman Company can be taxed there. Its capital stock, as such, is certainly not taxable there. In the case of *Telegraph Co. v. Attorney-General*, the tax was sustained only on the ground that it was a tax on the property in Massachusetts. The idea that the capital stock, as such, could be taxed was repudiated. The state can no more tax the capital stock of a foreign corporation than it can tax the capital of a foreign person. Pennsylvania cannot tax a citizen and resident of New York, either for the whole or any portion of his general property or capital. It can only tax such property of that citizen as may be located and have a *situs* in Pennsylvania. *State Tax on Foreign Bonds*, 15 Wall. 300. And it is exactly the same with a foreign corporation. Its capital, as such, is not taxable. *Ferry Co. v. Pennsylvania*, *qua supra*. To hold otherwise would lead to the most oppressive and unjust proceedings. It would lead to a course of spoliation and reprisals that would endanger the harmony of the Union.*

Interstate commerce.—The subject of interstate commerce is treated at length in note to *Norfolk & Western R. Co. v. Pennsylvania*, 2 Am. R. R. & Corp. Rep. 639. Sections 5, 6, 7 and 8 treat of the subject of taxation. *Bain v. Richmond & Danville R. Co.*, 2 Am. R. R. & Corp. Rep. 186, decides that rolling stock belonging to a foreign railroad corporation and employed in inter-

* Reported in 11 Sup. Ct. Rep'r. 876.

state traffic cannot be taxed by a state, though it may constantly have a large amount of such stock within the state. See, also, on the subject of interstate commerce, *State v. Indiana, etc.*, R. Co., 1 Am. R. R. & Corp. Rep. 1; *Louisville, etc., R. Co., v. Mississippi*, 1 Am. R. R. & Corp. Rep. 724. *State, ex rel., v. Cincinnati, etc.*, R. Co., 2 Am. R. R. & Corp. Rep. 106; *McCall v. California*, 2 Am. R. R. & Corp. Rep. 632; *Stanley v. Wabash, etc.*, R. Co., 2 Am. R. R. & Corp. Rep. 654.

HAZEL ET UX. V. CHICAGO, M. & ST. P. R. CO.

(Supreme Court of Iowa, May 30, 1891.)

1. CARRIERS. LIMITING LIABILITY. CONFLICT OF LAWS. Where, in another state, goods are delivered to a common carrier for transportation into Iowa under a contract limiting its liability, valid where made, but void under the laws of Iowa, the contract is valid, and governs the liability of the carrier, though the loss occurs in this state.

2. Under Civil Code Dakota, section 1261, providing that the obligations of a common carrier may be limited by special contract, the carrier may by special contract, signed by the consignor, be released from liability except for negligence, and the liability may be limited to \$5 for each hundred-weight of goods.

APPEAL from district court, Woodbury county, George W. Wakefield, judge.

This is an action at law to recover the value of certain household goods, which it is claimed the plaintiffs shipped over the defendant's railroad from White Lake, in Dakota, to Sioux City, in this state. It is averred in the petition that the defendant failed to deliver said goods to the plaintiffs at Sioux City, and that they were lost. The defendant denied the allegations of the petition, and claimed that the property was delivered to the plaintiff at Sioux City, and that the plaintiffs entered into a written contract with the defendant, through its agent at White Lake, by which, in consideration of reduced freight charges, the plaintiffs agreed that in case of loss or damage while the goods were in possession of the defendant the amount to be paid by the defendant should not exceed \$5 per hundred pounds. There was a trial by jury, which resulted in a verdict and judgment for the plaintiffs in the sum of \$304. Defendant appeals.

O. J. Taylor for appellant. *Roberts & Roberts* for appellees.

ROTHROCK, J. The goods were shipped in the name of Mrs. G. Hazel or Mrs. George Hazel. There is a conflict in the evidence as to whether the box in question was delivered to the plaintiffs at Sioux City, and whether the plaintiff George Hazel, who personally attended to the shipment, signed the name "Mrs. G. Hazel" to the alleged contract limiting the liability of the defendant as carrier of the goods. These disputed facts demand no further consideration than to say that they were for the jury to determine, and we find no reason for disturbing the verdict, so far as these questions are involved.

The only real question in the case arises upon the construction of the legal effect of the alleged contract limiting the liability of the defendant as a common carrier. It is not disputed that the box of goods in question was transported from White Lake to Sioux City, and that, if it was lost, the loss occurred after the property was brought into this state; and no question is made as to whether the defendant is liable as a common carrier or as the keeper of a warehouse. The learned district judge was of the opinion that, while the contract limiting the liability might be valid in Dakota, yet, as the contract of shipment was to be partly performed in this state, the contract limiting liability is contrary to section 1395 of the Code, which in effect declares such contract to be void, and that the courts of this state will not give extra territorial effect to such an act of a sister state. The offer to introduce said contract in evidence was overruled, and it was ignored in the instructions to the jury. It was held in *McDaniel v. Railway Co.*, 24 Iowa, 412, that where a railway company undertook to transport a certain lot of cattle from Clinton, in this state, and deliver them in Chicago, the contract, being entire and partly to be performed in this state, must be governed by our law as to its validity and interpretation, and that a restriction as to liability by the company, although valid under the law of Illinois, was invalid in this state, and the carrier was liable the same as if no such stipulation had been inserted therein.

In *Talbott v. Transportation Co.*, 41 Iowa, 247, a contract for the transportation of certain goods from Hartford, Conn., to Des Moines, in this state, contained exemptions from liability for loss by fire. The goods were destroyed by fire while in transit at Chicago, Ill. It was held that, as the exceptions were valid in

the state where the contract was made, and valid in the state of Illinois, where the loss occurred, the contract was valid, and there could be no recovery for the loss. The question as to the validity of the contract if the loss had occurred in this state was not determined. Applying the rule of the case last cited, if the goods in controversy had been lost while in the possession of the defendant in Dakota the liability would be limited as provided in the contract. It is claimed by counsel for appellees that the contract is void even under the laws then in force in the territory of Dakota. Dakota was a territory at the time the shipment of the goods was made. The answer of the defendant sets forth the following as the law of the territory at that time in force: "Section 1261. The obligations of a common carrier cannot be limited by general notice, but may be limited by special contract." "Section 1263. A passenger, consignor or consignee, by accepting a ticket, bill of lading or written contract for carriage, with a knowledge of its terms, assents to the rate of hire, the time, place and manner of delivery, therein stated. But his assent to any other modification of the carrier's rights or obligations contained in such instruments can only be manifested by his signature to the same." It is claimed in behalf of the plaintiffs that the contract restricting the liability of the defendant is not authorized by the above provisions of the law of Dakota. This position is not well taken. The statute expressly authorized the making of a special contract, limiting the obligations of a common carrier. The contract in question limits the liability to \$5 per hundred pounds, and the liability is to attach only for loss which occurs by the gross negligence of the defendant. It is claimed that under the rule announced in *Hartwell v. Railway Co.*, 41 N. W. Rep'r, 732 (decided by the supreme court of Dakota), the statute in question is held not to be different from the common law; but this is a mistake. All that is determined in that case is that under the sections of the statute above cited a condition in a bill of lading that the carrier would not be liable for any loss or damage unless claim was made therefor within a certain time was not binding upon the shipper, because the contract restricting the time of bringing suit was not signed by him. In the case at bar the contract purported to be signed by the shipper, and there was a strong conflict in the evidence as to whether the signature was

genuine. There is, therefore, no other ground upon which the exclusion of the contract from the consideration of the jury can be sustained, except that upon which it was placed by the district court. In our opinion it cannot be upheld on that ground. It is a fundamental rule, and one of almost universal application, that in case of a conflict of laws concerning a private contract the law of the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract, unless it is shown by the contract, or fairly inferable therefrom, that the parties intended that the law of another state or country should control their rights. In this case the parties contracted under the laws of Dakota, and the fact that such a contract is void in this state shows that it was intended that our law should not have any application to their contract.

The question as to the validity of such contracts where part performance is contemplated in a state or county where the law, statute or the decisions of the court are in conflict with the law of the place where the contract was made, has recently been exhaustively examined and discussed by the supreme court of the United States in the case of *Liverpool & G. W. Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 458; 9 Sup. Ct. Rep'r, 469. After a thorough consideration of adjudged cases the court announces its conclusion in the following language: "This review of the principal cases demonstrates that, according to the great preponderance, if not the uniform concurrence, of authority the general rule that the nature, the obligation, and the interpretation of a contract are to be governed by the law of the place where it was made, unless the parties at the time of making it have some other law in view, requires a contract of affreightment made in one country between citizens or residents thereof, and the performance of which begins there, to be governed by the law of that country, unless the parties when entering into the contract clearly manifest a mutual intention that it shall be governed by the law of some other country." We need not cite other cases in support of the rule above announced. Many of them will be found in 2 *American and English Encyclopædia of Law*, page 834. A number of these cases are plainly in point on the question under consideration. See, also, *Hutch. Carr.*, p. 108. Further elaboration or discussion appears to us to be unnecessary. Our

conclusion is that the court should have submitted the contract in question to the jury, with instructions that if they found that the name "Mrs. G. Hazel" was properly signed by George Hazel the plaintiffs were bound thereby. Reversed.*

1. **Common carriers — limiting liability.**— In the following cases it is held that a common carrier cannot limit his liability for loss or damage to goods by reason of his own negligence. *Georgia Pac. R. Co. v. Hughart*, 90 Ala. 36; 8 So. Rep'r, 62; *Boehl v. Chicago, etc., R. Co.*, 44 Minn. 191; 46 N. W. Rep'r, 333; *Chicago & N. W. R. Co. v. Chapman*, 133 Ill. 96; 24 N. E. Rep'r, 417. See, generally, *Pacific Express Co. v. Foley*, ante.

2. **Limiting liability as to amount.**— Where the loss was due to negligence it was held that the measure of damages was the market value of the goods, though the bill of lading contained a clause limiting the carrier's liability to the amount of \$5 for each hundred pounds. *Georgia Pac. R. Co. v. Hughart*, 90 Ala. 36; 8 So. Rep'r, 62; *S. P., Boehl v. Chicago, etc., R. Co.*, 44 Minn. 191; 46 N. W. Rep'r, 333.

3. **Limiting liability of connecting roads as to each other's negligence.**— Where a bill of lading, containing a clause limiting the liability of each connecting road to loss or injury suffered while the goods are on its line, is accepted by the shipper, there is a legitimate limitation of liability, which is binding on each of the contracting parties, even though the shipper was unable to read, and did not know that the limiting clause was in the bill of lading. *Jones v. Cincinnati, etc., R. Co.*, 89 Ala. 376; 8 So. Rep'r, 61. To same effect, *Texas, etc., R. Co. v. Adams*, 78 Tex., 373; 14 S. W. Rep'r, 666.

4. **Limitation as to time of presenting claim or commencing suit.**— A bill of lading provided that claims for loss or damages must be presented to the delivering line in thirty-six hours after the arrival of the freight. The consignee resided a short distance from the depot, and received the goods Saturday afternoon, but did not open them until Monday morning, having been sick in the interval. Held, that the reasonableness of the stipulation was a question for the jury. *Texas, etc., R. Co. v. Adams*, 78 Tex. 373; 14 S. W. Rep'r, 666. In a contract for the transportation of cattle, a common carrier may provide that suit on any claim thereunder must be brought within forty days after the damage occurred, and such a provision will bar an action for delay commenced seventy-seven days after the delivery of the cattle, the carrier having notified the plaintiff twenty-five days after the delivery that his claim would not be paid. *Gulf, etc., R. Co. v. Gateword*, 79 Tex. 89; 14 S. W. Rep'r, 918.

5. **Limitation as to liability for delay caused by mobs, strikes, etc.**— Where the shipper expressly agrees to assume all risk of delay caused by any mob or strike or threatened violence to person or property, he cannot recover for delay occasioned by a strike and violence of such magnitude as to require the military forces of the government to overcome. *Gulf, etc., R. Co. v. Gateword*, 79 Tex. 89; 14 S. W. Rep'r, 918.

6. **Validity of limitation as affected by interstate law.**— Where cattle

* Reported in 48 N. W. Rep'r, 926.

were received for transportation from a point in Texas to Chicago, the bill of lading providing that the carrier should be liable only while the cattle were on its own road. The route over that was wholly within the state, and the delay was caused by the refusal of the connecting lines to receive the cattle on account of a strike on their roads. Held, that provisions limiting the time in which suit could be brought, and releasing the carrier from liability for delay caused by strikes, are valid, whether the contract of shipment be considered as interstate or as one to be wholly performed within the state. *Gulf, etc., R. Co. v. Gateword*, 79 Tex. 89; 14 S. W. Rep'r, 918.

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DELAWARE, L. & W. R. Co. v. CONVERSE.

(Supreme Court of the United States, March 30, 1891.)

1. RAILROAD COMPANIES. ACCIDENT AT CROSSINGS. WHERE NEGLIGENCE IS MATTER OF LAW. The severing of a train of cars in the night-time, leaving the rear portion of them, uncontrolled otherwise than by ordinary brakes, to make a running switch across a public highway at grade, without any warning that they are approaching, is in such obvious disregard of the rights of a traveler on the highway, who attempts to drive across after the passage of the first section of the train, that the court is warranted in instructing the jury, as matter of law, not simply that such facts are evidence of negligence, but that they constitute negligence.

2. CONTRIBUTORY NEGLIGENCE. INSTRUCTIONS. A finding by the jury, on conflicting evidence, that plaintiff was not guilty of contributory negligence, will not be disturbed where the court has charged that it was plaintiff's duty to stop a safe distance from the track and look and listen for trains; that if, after crossing the first or second tracks, the plaintiff, by the exercise of great care, could have discovered the approach of the cars on the third track, he was guilty of carelessness in not stopping short of that track; and that, if plaintiff's view was obstructed by standing cars, he was guilty of negligence in not standing up in his carriage, if by so doing he could have seen over them.

3. EVIDENCE. Admitting evidence for plaintiff that the highway in question had existed for thirty years and before the railroad was built, as it tends to show that defendant was not ignorant of its existence, is not error, even if incompetent, there being no dispute as to the existence of the highway.

4. EVIDENCE OF PLAINTIFF'S NEGLIGENCE ON PRIOR OCCASIONS. Evidence that plaintiff had negligently driven over the crossing two hours before the accident is not admissible to show negligence on his part at the time of the accident.

5. IMPEACHING EVIDENCE. Evidence that the railroad company's night watchman had admitted on the night of the accident that the rear section of the train was going at about fifteen miles an hour when it crossed the highway, is admissible to impeach his credibility, where, on his cross-examination, he has denied making such admission.

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IN ERROR to the circuit court of the United States for the district of New Jersey.

The object of this action is to recover damages for injuries, in person and property, alleged to have been sustained by the defendant in error (who was the plaintiff below), in consequence of the negligent manner in which the cars of the plaintiff in error were operated on the occasion when such injuries were received. The jury returned a verdict against the railroad company for \$14,000. That amount being regarded by the court as excessive, the plaintiff remitted all of it except \$7,500, and judgment was entered for the latter sum.

While there was some conflict in the evidence relating to certain matters, the following facts were clearly established: The plaintiff, at the time of the injuries in question, and for ten years previous thereto, was the county physician of Hudson county, N. J. In the discharge of his duties, he went daily from Jersey City to the county farm, on which were located a penitentiary, insane asylum and alms-house belonging to the county, and which were reached by a public road crossing the Boonton branch of the Delaware, Lackawanna & Western railroad at Secaucus station in the vicinity of the county farm. That road, commonly called the "county road," is built through meadow lands, which are unoccupied, except as they have been appropriated and used for the purposes of the railroad company. There is, substantially, no travel upon it except by those going to and from the county farm. About a half dozen wagons or vehicles on an average pass over the crossing every night. The road is from twenty-five to thirty feet in width, and macadamized, and without a fence upon either side of it. At the crossing in question there are two main tracks of the railroad, one called the "east-bound" and the other the "west-bound" track; and five other tracks — two on the south side of the east-bound track, and three on the north side of the west-bound track.

The plaintiff, on the 13th day of March, 1886, went from Jersey City to the county farm over this county road, in a four-wheel buggy or phaeton, having a top or hood that could be let down or raised. He reached the county farm, crossing the railroad tracks at Secaucus station, between six and seven o'clock, in the evening of that day, and started back to Jersey City about eight o'clock. As he approached the station on his return, sitting in his buggy, with

the top up, and moving at an easy gait, he observed, about fifteen minutes after eight o'clock, at a distance of one hundred feet or less, a train of freight cars, drawn by a locomotive engine, coming on the defendant's road from the west. The train, just before reaching the point where the county road crossed the railroad tracks, was severed by the direction of those in charge of it; the engine, with the twelve cars next to it, going ahead over a switch into the railroad yard, while the other cars, twelve in number, with a caboose attached to them, making what is called a "running switch," were left to follow, by their own momentum, without being controlled otherwise than by ordinary brakes. When the engine and cars constituting the first section of the train passed the county road there was a gap between the two sections of the severed train, the rear section being about ninety feet behind the other, and passing across the county road at the rate of about ten miles an hour. The plaintiff attempted to cross the railroad tracks as soon as the engine and the cars attached to it had cleared the county road. There were neither gates, lights, nor flagman at the crossing. There was no light on the front car of the rear section of thirteen cars when they reached the crossing. The only light upon the cars of that section when they reached the crossing was in the caboose. Before reaching the crossing, a brakeman on the rear section had a lantern that was placed on the platform at the rear end of the first car of that section, which platform was, however, two feet below the roof of the car. This light was extinguished by the wind before the rear section of the train reached the crossing. After the plaintiff got on the railroad tracks with his buggy, but before reaching the east-bound main track, he discovered the cars constituting the rear section of the train, distant but a few feet, coming down upon him, and too close to be avoided. The train hit his buggy, entirely destroying it, and seriously, if not permanently, injuring him.

Upon substantially these facts, about which there could not be any dispute, the court instructed the jury as matter of law that the railroad company was negligent in respect to its duty to persons traveling upon the public road in question; and that the plaintiff was entitled to recover damages for any injuries sustained by him as the result of such negligence, unless it appeared that he contributed to such injuries by his own carelessness.

It is contended that the court erred in not submitting to the jury the issue as to defendant's negligence.

J. D. Bedle for plaintiff in error. *J. B. Vredenburg* for defendant in error.

Mr. Justice HARLAN, after stating the facts in the foregoing language, delivered the opinion of the court.

Undoubtedly, questions of negligence, in actions like the present one, are ordinarily for the jury, under proper directions as to the principles of law by which they should be controlled. But it is well settled that the court may withdraw a case from them altogether, and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed, or is of such conclusive character that the court, in the exercise of sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it. *Insurance Co. v. Doster*, 106 U. S. 30, 32; 1 Sup. Ct. Rep'r, 18; *Griggs v. Houston*, 104 U. S. 553; *Randall v. Railroad Co.*, 109 U. S. 478, 482; 3 Sup. Ct. Rep'r, 322; *County of Anderson v. Beal*, 113 U. S. 227, 241; 5 Sup. Ct. Rep'r, 433; *Schofield v. Railway Co.*, 114 U. S. 615, 618; 5 Sup. Ct. Rep'r, 1125. "It would be an idle proceeding," this court said in *North Penn. Railroad v. Commercial Bank*, 123 U. S. 727, 733; 8 Sup. Ct. Rep'r, 266, "to submit the evidence to the jury when they could only justly find in one way." In the present case it was incumbent on the plaintiff, as a condition of his right to recover, to prove that the defendant was guilty of negligence, resulting in his being injured, and that issue being in his favor, he was entitled to a verdict, unless it appeared that his own negligence substantially contributed to his injury. If the evidence was so conclusive against the defendant upon the question of its negligence that the jury could not reasonably find to the contrary, it was competent for the court, within the doctrines of the cases above cited, to so instruct them, leaving the jury to determine the question of the plaintiff's negligence, in respect to which the evidence was conflicting.

The inquiry, therefore, is whether the court erred in holding, as matter of law under the evidence, that the defendant was guilty of negligence. Upon this question we entertain no doubt. While those using a public highway are under a duty to keep out of the

way of railroad cars crossing it, and to exercise to that end such care as the circumstances make necessary, the railroad company, in moving cars upon its road, is bound to observe like care toward those who, while traveling upon such highways, whether on foot or in vehicles, are obliged to pass over its tracks. The right of a railroad company to the use of its tracks for the movement of engines and cars is no greater in the eye of the law than the right of an individual to travel over a highway extending across such tracks. The former is granted subject to the condition, necessarily implied, that it shall be so used as not unreasonably to interfere with or abridge the latter. The obligation to use one's property in such a manner as not to injure that of others rests equally upon corporations and individuals. The duty of railroad companies whose tracks cross public highways at grade to give warning to those traveling upon them has been under consideration in many adjudged cases. When the subject is regulated by statute it may not be difficult, in a particular case, to determine whether the railroad company has performed its duty in that regard to the public. If there be no statute prescribing in what mode the necessary warning shall be given when a train of cars is approaching a public highway crossing a railroad track at grade, the question of negligence must be determined by the special circumstances of each case. In some localities, in thickly settled communities, greater vigilance and more safeguards are required upon the part of the railroad company than would be necessary in other localities. What would be due care in one locality might be negligence in another. A very high degree of caution and circumspection is required under some circumstances. Without attempting to formulate a general rule applicable in every case of injury to person or property, it is sufficient here to say that the severing of defendant's train of cars in the night-time, leaving a part of them, uncontrolled otherwise than by ordinary brakes, to run across a public highway at grade, without some warning by a flagman, or by bell or whistle, or in some other effective mode, that they were approaching, was in such obvious disregard of the rights of persons using that highway that the court was justified in saying, as matter of law, not simply that such facts were evidence of negligence, but constituted negligence upon the part of the company. It was justified in so instructing the jury, because every one

knows, and, therefore, the court below knew, that such use of the defendant's tracks where they crossed the county road unnecessarily endangered the safety of any who at the time crossed the railroad tracks while traveling on that highway. The county road upon which the plaintiff was traveling was not, it is true, much used by the general public; but that fact only affects the degree of care the defendant was bound to observe, and does not establish a right to have its cars approach the crossing where the plaintiff was hurt, and over which the public were entitled to pass, as if there were no highway there at all. The court, in our judgment, did not err in holding as matter of law, upon the undisputed facts in the case, that the defendant was guilty of negligence in the particulars to which we have adverted.

The next question is as to the instructions relating to the alleged contributory negligence upon the part of the plaintiff. In *Railroad Co. v. Jones*, 95 U. S. 439, 442, it was said that, where the damage was occasioned entirely by the negligence or improper conduct of the company, the plaintiff is entitled to recover; but that, where "the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary care and caution that, but for such negligence or want of care and caution on his part, the misfortune would not have happened," he could not recover. So, in *Railroad Co. v. Houston*, 95 U. S. 697, 702, which was an action for damages against a railroad company upon the ground of negligence, it was said: "The failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company's employees in those particulars was no excuse for negligence on her part. She was bound to listen and to look before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses she could not have failed both to hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others." Again, in *Kane v. Railway Co.*, 128 U. S. 91, 94; 9 Sup. Ct. Rep'r, 16, which was an action by an employe of a railway company to recover damages for personal

injuries alleged to result from its negligence, this court said "that an employe is guilty of contributory negligence which will defeat his right to recover for injuries sustained in the course of his employment where such injuries substantially resulted from dangers so obvious and threatening that a reasonably prudent man, under similar circumstances would have avoided them if in his power to do so." See, also, *District of Columbia v. McElligott*, 117 U. S. 621, 633; 6 Sup. Ct. Rep'r, 884. These principles are applicable to the issue in this case as to contributory negligence.

The jury were told that while it was the duty of the railroad company to exercise great care to warn travelers on a public highway of approaching trains, it was an equally imperative duty in travelers to exercise the same degree of care to avoid and keep off the railroad tracks when trains are approaching the crossing; that, if the plaintiff advanced to and upon the tracks of the railroad without the exercise of such care to discover the approach of trains, or attempted intentionally to pass in front of a train within dangerous proximity, he was guilty of negligence; that when at a safe distance from the tracks, where the opportunity of seeing was best, it was his duty, especially in view of the dangerous character of this crossing, to stop, look up and down the road, and listen for trains; and that, if he did not stop, look and listen, he was guilty of carelessness; that if, after crossing the first or second track, the plaintiff, by the exercise of such care, could have discovered the approach of the train which struck him, he was guilty of carelessness in not discovering it, and stopping short of the east-bound track; that the jury must judge of the plaintiff's opportunity of seeing whether standing cars were in the way, and, if they were, whether he could have seen over them by standing up in his carriage; that if he could he should have stood up; that of all this the jury must judge; and that, if they found from the evidence that the plaintiff was guilty of such negligence, he could not recover. Whatever objections the plaintiff may have urged against these instructions, surely the defendant, upon the issue as to the plaintiff's negligence, was not prejudiced by what was thus said by the court to the jury. The jury have found that the plaintiff was not guilty of contributory negligence. That question was properly submitted to them upon all the evidence, which

was contradictory ; and, as no error of law in reference thereto was committed to the prejudice of the defendant, we have no authority to review their finding in that respect. *Parsons v. Bedford*, 3 Pet. 433, 447; *Railroad Co. v. Fraloff*, 100 U. S. 24, 31.

It is assigned for error that the court allowed the plaintiff, against the objection of the defendant, to prove that the highway in question was established before the railroad was constructed. We do not presume that this fact was at all important in the case. When the witness was asked whether the public highway was there before the railroad, the court properly observed that the responsibility of the defendant was not increased or diminished, whether the fact was one way or the other. But it permitted the witness to be asked whether the county road was an old and well-established highway. The question was then changed into an inquiry simply as to how long that highway had been established. The witness answered that he went over it in 1857. The object of this proof was, as we suppose, to show that the defendant could not be ignorant of the fact that at the crossing in question there was a public highway. In that view the evidence, though not important, was not incompetent. There was no dispute as to the existence of the county road as a public highway, and what the witness said, even if incompetent as evidence, could not possibly have affected the result.

Another error assigned is the refusal of the court to allow proof by the defendant of the fact that the manner in which the plaintiff crossed the railroad tracks between six and seven o'clock in the evening, on his way from Jersey City to the county farm, showed negligence upon his part. Plainly, this evidence was irrelevant. It did not in any wise illustrate the issue as to whether the defendant was guilty of negligence, or whether the plaintiff was guilty of contributory negligence two hours later in the evening, when the plaintiff, returning from the county farm, attempted to cross the railroad tracks.

At the trial below the plaintiff recalled a witness, Stewart, in rebuttal, and was permitted, against the objection of the defendant, to propound this question : " Did Mr. O'Brien tell you that night what speed, in his judgment, the train that hit the doctor was moving at the time it hit him ? " The answer was : " Yes ; he said about sixteen miles an hour, positively. " The action of

the court in permitting this question and answer is assigned for error. O'Brien was the defendant's night yardmaster at the station, and had testified in chief for defendant that the rear section of the train, when it crossed the county road, was going about ten miles an hour. He denied, upon cross-examination, that he said to Stewart, the night of the accident, that the rear section of the train was moving at the rate of fifteen miles an hour, or that he used words to that effect. The object of the evidence to which the defendant objected was to impeach the credibility of O'Brien. It was competent for that purpose; but, if it was not, the admission of it is not ground for reversal. Whether the train, when it struck the plaintiff's buggy, was going at the rate of ten or sixteen miles an hour, the court rightly held the defendant guilty of negligence, leaving to the jury to determine upon the evidence the question of plaintiff's contributory negligence.

We perceive no error in the judgment, and it is affirmed.*

ACCIDENTS AT RAILROAD CROSSINGS.

1. **Accidents at railroad crossings — contributory negligence — when it will not prevent a recovery.**— Where the injury to plaintiff is willfully inflicted or is brought about by such gross negligence on the part of the railroad company as to amount to a reckless disregard of human life it is held that the plaintiff can recover notwithstanding he has been guilty of contributory negligence. *Georgia Pac. Ry. Co. v. O'Shields*, 90 Ga. 29; 8 So. Rep'r, 248; *Hile v. Mo. Pac. Ry. Co.*, 101 Mo. 36; 13 S. W. Rep'r, 946; *Hanlan v. Mo. Pac. Ry. Co.*, 104 Mo. 331; 16 S. W. Rep'r, 233. But mere gross negligence on the part of the company is not sufficient to justify a recovery. *Rowan v. New York, etc., R. Co.*, 59 Conn. 364; 21 Atl. Rep'r, 1037.

2. **Attempting to pass when safety-gates down.**— Plaintiff's intestate attempted to cross defendant's road on a street across which there were four tracks. Two trains were approaching at the time, and in avoiding one he was killed by the other. The safety-gates were down when he attempted to cross, and he knew that their being down signified that trains were passing. Held, that plaintiff should be nonsuited. *Cherry v. Philadelphia, etc., R. Co.*, 140 Penn. St. 19; 21 Atl. Rep'r, 242.

3. **Attempting to pass between cars of standing train.**— A person who attempts to cross a street which is obstructed by a train of cars, by stepping on the coupling-pins, and climbing across, without looking to see if there is an engine attached, is guilty of such contributory negligence as will prevent his recovery from the railroad company for injuries sustained by the sudden starting of the train. *Hudson v. Wabash, etc., R. Co.*, 101 Mo. 13; 14 S. W. Rep'r, 15. See, also, *Gurley v. Mo. Pac. R. Co.*, 104 Mo. 311; 16 S. W. Rep'r, 11. Plaintiff cannot be relieved in such case from the effects of his negligence by

* Reported in 11 Sup. Ct. Rep'r, 569.

the fact that there was an ordinance prohibiting railroad companies from obstructing streets with their cars. *Hudson v. Wabash, etc., R. Co.*, 101 Mo. 18; 14 S. W. Rep'r, 15.

4. *Crossing in front of approaching train—mistaking speed of same.*—Deceased was postmaster and express agent at a station on defendant's railroad. He was killed by an engine running ahead of the express train, and on the same schedule, at about thirty miles an hour. At that point all persons having business with trains were obliged to cross the track in front of them. The view of the track was obstructed. Deceased, supposing that the train which struck him was the regular train, and would stop, attempted to cross the track. Deceased was a prudent man, and the engineer was very reckless. Held, that a verdict for \$15,000 would not be disturbed. *Chesapeake, etc., R. Co. v. Hendricks*, 88 Tenn. 710; 13 S. W. Rep'r, 696.

5. *View obscured—mistaking signals.*—Plaintiff's intestate was killed by a train while driving across defendant's track at the public crossing. There were six tracks, and the intestate drove his team, which was gentle, and under his control, at a walk upon the crossing without perceiving any approaching train, though he looked and listened, the view being obscured by cars and buildings. While he was crossing, some men signaled him to stop, but he, misunderstanding the signal, started his team at a trot. They became unmanageable on seeing the approaching train, and he was run over and killed. Held, that the question of contributory negligence was for the jury. *Baltimore, etc., R. Co. v. Walborn*, 127 Ind. 143; 26 N. E. Rep'r, 207.

DURAN V. STANDARD LIFE & ACC. INS. CO.

(Supreme Court of Vermont, April 14, 1891.)

1. *ACCIDENT INSURANCE. INJURY WHILE VIOLATING LAW. WALKING OR HUNTING ON SUNDAY.* A person who walks from one town to another on Sunday, for the purpose of hunting, violates the Revised Laws of Vermont, sections 4315, 4316, which forbid hunting on Sunday, or traveling on Sunday, except from necessity or charity; and an injury occasioned by his slipping on frozen ground, while returning home from hunting on Sunday, is not covered by an insurance policy, exempting the company from liability where a "violation of law" is the act, cause or condition, "wholly or partly, directly or indirectly," producing the injury, or where the injury is "effected by any such act, cause or condition, or under its influence.

EXCEPTIONS from Chittenden county court, Peck, judge. *Assumpsit* by Joseph Duran against the Standard Life and Accident Insurance Company on two policies of accident insurance. There was judgment for plaintiff, and defendant excepts. Reversed.

W. L. Burnap and *J. J. Enright* for plaintiff. *Seneca Haselton* and *L. F. Englesby* for defendant.

THOMPSON, J. This is an action of *assumpsit* on two policies issued by defendant to plaintiff insuring him against accidental injuries. If the plaintiff has any ground of recovery, it rests wholly on these contracts of indemnity. A contract of insurance is to be construed according to its terms and the evident intent of the parties as gathered from the language used. All conditions involving forfeitures, as well as all exemptions, are to be construed strictly against the insurer, and most favorably for the insured. Yet the language of the contract is to be construed as a whole, is to receive a reasonable interpretation, and the risk is not to be extended beyond what is fairly within the terms of the policy. *May Ins.* (2d ed.), §§ 172, 175; *Brink v. Insurance Co.*, 49 Vt. 442; *Mosley v. Insurance Co.*, 55 Vt. 142; *Darrow v. Society*, 116 N. Y. 537; 22 N. E. Rep'r, 1093; *Mutual Assur. Soc. v. Scottish Union & Nat. Ins. Co.*, 84 Va. 116; 4 S. E. Rep'r, 178. Each policy contains the following clause: "This insurance does not cover * * * injury resulting wholly or partly, directly or indirectly, from any of the following acts, causes or conditions, or when effected by any such act, cause or condition, or under its influence." Then follows an enumeration of such acts, causes or conditions, among which is "violation of law" by the insured.

The injury for which plaintiff seeks to recover is an injury to his knee sustained by him on Sunday, January 20, 1889. The plaintiff and a companion, about nine o'clock in the forenoon of that day, took guns and ammunition, and set out from Burlington on foot for Colchester on a hunting expedition. They traveled on the highway six or seven miles, and then took dinner with a Mr. Coates. After dinner they engaged in hunting with Coates, who went with them as far as a Mr. Thayer's, where they stopped a short time. Here Coates left them, and the plaintiff and his companion started for home through a field, and, while crossing frozen plowed ground in the field to get to the highway, the plaintiff's foot slipped upon the frozen plowed ground, and his knee was injured. At the time of slipping he was carrying his gun. The accident occurred between two and three o'clock in the afternoon.

The defendant contends that the facts of the case bring it within the provisions of the policy in respect to violations of law,

and that, therefore, the plaintiff cannot recover. Revised Laws, section 4315, prohibits traveling on Sunday, except from necessity or charity, or visiting from house to house except from motives of humanity or charity, or for moral or religious edification. Revised Laws, section 4316, prohibits hunting, shooting, pursuing, taking or killing wild game, or other birds, or animals, on Sunday. A person violating the provisions of either of these sections is to be fined. At the time of the accident, the plaintiff was engaged in hunting. He had his gun with him, and was ready to shoot any game he might see whether in the field or on the highway on his way home. He started out to secure game wherever he might find it, and it does not appear that at the time of the accident he had abandoned this purpose. In hunting he was violating the law of this state. The traveling of the plaintiff was as much a part of his act of hunting as carrying his gun and ammunition, or shooting or capturing game when the opportunity occurred in the course of the hunt. Without walking the plaintiff could not have engaged in his hunt. Thus the accident was caused directly by plaintiff's violation of the law in hunting. The effect of the violation of the Sunday law upon a person's right to recover for injuries received in the course of such violation has generally arisen in cases in which the defendant sought to escape responsibility for his own tort to a traveler or laborer.

On this question the decisions have not been uniform. Some courts have held that the immediate cause of the injury was the travel or labor on Sunday, and that the plaintiff could not recover. Of this class of cases are *Day v. Railway Co.*, 135 Mass. 113; *Cratty v. City of Bangor*, 57 Me. 423. Other able courts have held that a Sunday traveler or laborer, injured by the wrongful act or neglect of another, might recover upon the ground that the violation of the Sunday law by the injured party is in the nature of a condition, rather than an immediate cause of the injury. To this effect are *Baldwin v. Barney*, 12 R. I. 392; *Platz v. City of Cohoes*, 89 N. Y. 219; *Sutton v. Town of Wauwatosa*, 29 Wis. 21. In *Johnson v. Irasburgh*, 47 Vt. 28, the court avoided the line of reasoning adopted in each of these classes of cases, by holding that a town was not bound to maintain a safe and sufficient highway for unlawful travel on Sunday or any other day,

and that a person using the highway in violation of the Sunday law was there at his own risk, there being no duty or liability on the part of the town in respect to the highway except that imposed by statute. The plaintiff's right of recovery rests in contract, and not in tort. No act or neglect of the defendant caused or contributed to the plaintiff's injury. Were the reasoning in *Baldwin v. Barney*, supra, to be adopted, it would not avail the plaintiff, for, if being engaged in the unlawful expedition was not the immediate cause of his injury, it was certainly the condition causing it. The provision quoted from the policy excluded liability from any injury of which a violation of the law was the cause or condition producing it. It also expressly provides exemption from liability where violation of law is either the proximate or remote cause or condition producing the injury. In short, it is so drawn as to exempt from liability under the reasoning and the holding of the courts in both classes of cases cited.

The plaintiff contends in argument that he was not engaged in hunting at the time he received the injury, but was walking home after he had been visiting. Were this claim conceded, we do not see how it gives plaintiff any better ground for recovery. He was not out simply for open air and gentle exercise, without any object of business or pleasure, as in *Hamilton v. City of Boston*, 14 Allen, 475, but was traveling several miles and from town to town, on this theory, to make a visit for pleasure. In *Cratty v. City of Bangor*, supra, the plaintiff was traveling on foot on Sunday with other persons to make a visit of pleasure to a friend, and it was held that he was traveling in violation of a statute prohibiting traveling on Sunday, unless for charity or necessity. The court further says that "no distinction is made between those who travel within town and those who travel from town to town." In going from Burlington to Colchester and back, a distance of twelve or fourteen miles, to visit Coates for pleasure, or to hunt, the plaintiff was clearly violating the provisions of Revised Laws, section 4315, prohibiting traveling on Sunday. Every step he took in making that trip was in and of itself a violation of law. In taking one of those steps he slipped and was injured. We think it would savor too strongly of hair-splitting refinement to hold that the injury was not directly caused by the violation of the law in traveling. But, in this view of the case, the excep-

tion in the policy exempts the defendant from liability, whether the traveling is held to be the cause or only a condition producing injury, or influencing it, directly or indirectly. The liability to accident must be greatly enhanced in the case of a person who, like the plaintiff, engages in hunting or traveling about the country on Sunday, in open violation of law, as compared with one who observes the law. The defendant has a right to say that it would not assume such increased risk. The defendant not having contracted to indemnify the plaintiff for the injury which he received, he cannot recover. Judgment reversed, and judgment for defendant.*

1. **Accident insurance — intentional act of another.** — A clause in an accident insurance policy exempting the company from liability for "intentional injuries inflicted by the insured or any other person" precludes a recovery when the insured has been killed by the intentional act of another, and the company need not show that such injuries were inflicted at the instance of the insured. *Travelers' Ins. Co. v. McCarthy*, 15 Col. 851; 25 Pac. Rep'r, 718.

2. **Loss of the sight of both eyes.** — Defendant insured plaintiff against accidental death and permanent disability in the sum of \$1,000, the certificate of insurance providing *inter alia* for the payment of "the whole of principal sum named herein," in the event of "the total and permanent loss of the sight of both eyes." Before the insurance, plaintiff had lost the sight of one eye, which was known to the general and the soliciting agent of the company when plaintiff was insured. Subsequently he sustained the loss of the remaining eye. Held, that he was entitled to recover the entire amount. *Humphreys v. National Benefit Assn.*, 139 Penn. St. 264; 20 Atl. Rep'r, 1047.

3. **Partial disability — policy construed.** — A certificate of membership in an accident insurance association provided for relief for accident resulting in "total permanent" or "partial permanent" disablement, and there was no provision in the certificate itself for the payment of any benefits for an injury which resulted in partial disablement unless it was also of a permanent character. Held, that the liability of the company was not enlarged so as to embrace cases of merely partial disablement of a temporary character by an indorsement on the certificate, which provided that if the member shall sustain bodily injuries, whether partially or totally disabling, "by means as provided for in this certificate," the payment of the weekly relief should exonerate the company from all further liability, following by a schedule designating different kinds of injuries, with a specified period of relief for each, and a statement that "injuries not included in the above schedule will be adjusted on their merits." *Hallebaugh v. People's Mut. Accident Ins. Assn.*, 188 Penn. St. 595; 22 Atl. Rep'r, 29.

4. **Hazardous occupation — hunting for recreation.** — A by-law providing that "any member receiving an injury while engaged temporarily, or otherwise, in an occupation more hazardous than the one in which he was engaged

* Reported in 22 Atl. Rep'r, 530.

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when insured," does not apply to a member insured as a merchant, who is accidentally killed while hunting for recreation, though the occupation of hunter is classified by the association as more hazardous than that of merchant, since hunting cannot be said to be his "occupation," even temporarily. *Union Mut. Acc. Assn. v. Frohard*, 124 Ill. 228; 25 N. E. Rep'r, 642. The fact that the language of the certificate was "act or occupation claimed as more hazardous," would not affect the result. *Ibid.*

5 Failure to make assessment at proper time — deficiency — remedy.— Where a by-law provides that on death of a member, where there is not enough money in the treasury to pay the claim, there shall be an assessment on the members, from which, if it is sufficient, the claim shall be paid in full, and it appears that on the death of a member the corporation wrongfully refused to make such assessment, and that, if made at the proper time, the assessment would have paid the claim in full, it is proper, when afterward decreeing that such an assessment should be made, to direct that, if the assessment prove insufficient to pay the claim in full, the association shall make up the deficiency. *Ibid.*

O'CONNELL V. EAST TENNESSEE, V. & G. RY. CO.

(Supreme Court of Georgia, May 27, 1891.)

EMINENT DOMAIN. OBSTRUCTING FLOOD-WATERS OF STREAM BY RAILROAD EMBANKMENT. DAMAGES. When a railway company erects an embankment for its track along the margin of a river, the accumulated waters of which, in times of flood, had previously escaped on that side, it being lower than the other, but which thereafter, and because of the embankment, overflowed the opposite side more than it had done before, and thus injured land there situate, the owner has a right of action against the company; or if, by the erection of such embankment, the river was deflected from its natural course, or deposits were made therein so as to raise its bottom, and from either of these causes such land was injured by the river when swollen, a recovery may be had for the damages thereby occasioned.

ERROR from superior court, Bibb county, A. I. Miller, judge.

Gustin, Gurry & Hall for plaintiff in error. *Bacon & Rutherford* for defendant in error.

LUMPKIN, J. The precise question in this case is whether the owner of land on the bank of a river can without liability erect on his own land an embankment which increases the overflow in times of flood upon the lands of the opposite proprietor, to the

injury thereof; or is there any duty for each owner to receive upon his land the share allotted it by nature of the flood-waters of the river. It is contended by defendant's counsel that the overflow from a river in time of flood or freshet is surface water, against which by the common law a man may protect himself without regard to the consequences to his neighbor. Many cases cited by him make a distinction between the common law and the civil law as to surface-water, the former allowing the land-owner to dispose of it in any way, the latter restraining him from so using it as to injure his neighbor's tenement. There is authority to show that there is no difference between the common and the civil law in this respect, but that the common follows the civil law. *Gillham v. Railroad Co.*, 49 Ill. 484; *Gormley v. Sanford*, 52 Ill. 158; and the able opinion in *Boyd v. Conklin*, 54 Mich. 583; 20 N. W. Rep'r, 595. There is much conflict in the American cases (*Washb. Easem.*, p. 485, *353, et seq.), the majority of the States seeming to follow the so-called "civil-law rule."

Thus it is material to consider whether the overflow, as above stated, is properly classed with surface water. This depends upon the configuration of the country, and the relative position of the water after it has gone beyond the usual channel. If the flood-water becomes severed from the main current, or leaves the stream, never to return, and spreads out over the lower ground, it has become surface water; but if it forms a continuous body with the water flowing in the ordinary channel, or if it departs from such channel *animo revertendi*, presently to return, as by the recession of the waters, it is to be regarded as still a part of the river. The identity of a river does not depend upon the volume of water which may happen to flow down its course at any particular season. The authorities hold that a stream may be wholly dry at times without losing the character of a water-course. So, on the other hand, it may have a "flood channel," to retain the surplus waters until they can be discharged by the natural flow. The low places on a river act as natural safety-valves in times of freshet; and the defendant claims the right to stop up one of these without liability for ensuing damage.

The English cases on the question are not numerous, though from the decisions and *dicta* of the judges the law appears to be well understood and settled. In *Rex v. Commissioners, etc.*,

of Pagham, 8 Barn. & C. 355, it was held that an owner of land on the seashore could erect works to protect his land from encroachments by the sea, without liability for damage inflicted on his neighbor. The sea was called a "common enemy," against which each might fortify at will. It appeared in *Rex v. Trafford*, 1 Barn. & Adol. 874, that a canal had been built by authority of parliament, and carried across a river and the adjoining valley by means of an aqueduct and an embankment containing several arches. A brook fell into the river above its point of intersection with the canal. In times of flood the water, which was then penned back into the brook, overflowed its banks, and was carried, by the natural level of the country, through the arches into the river, doing much mischief to the lands over which it passed. The aqueduct was sufficiently wide for the passage of the river at all times but those of high flood. The occupiers of the injured land adjoining the river and brook, for the protection thereof, erected banks (called "fenders"), so as to prevent the flood-water from escaping; consequently the water, in time of flood, came down in so large a body against the aqueduct and canal as to endanger them, and obstruct the navigation.

The fenders were not unnecessarily high, and without them many hundred acres of land would be exposed to inundation. It was held that the defendants were not justified, under these circumstances, in altering for their own benefit the course in which the flood-water had been accustomed to run; that there was no difference in this respect between flood-water and an ordinary stream; that an action would have lain at the suit of an individual; and, consequently, that an indictment lay where the act affected the public. The conviction was accordingly sustained. The doctrine of *Rex v. Commissioners, etc., of Pagham*, supra, was sought to be extended to this case, but Tenterden, C. J., who had rendered the decision in that case, said: "It has long been established that the ordinary course of water cannot be lawfully changed or obstructed for the benefit of one class of persons, to the injury of another. Unless, therefore, a sound distinction can be made between the ordinary course of water flowing in a bounded channel at all usual seasons, and the extraordinary course which its superabundant quantity has been accustomed to take at particular seasons, the creation and continuance of these fenders can-

not be justified. No case was cited or has been found that will support such a distinction. The Pagham Case * * * is of a very different kind. * * * In the one case the water is prevented from coming where, within time of memory at least, it never had come; in the other it is prevented from passing in the way in which, when the occasion happened, it had been always accustomed to pass." This seems to be an authoritative enunciation of the common law. *Menzies v. Breadalbane*, 3 Bligh (N. S.), 414, is directly in point, but was determined by the law of Scotland. Yet the lord chancellor said: "It is clear beyond the possibility of a doubt that by the law of England such an operation could not be carried on. The old course of the flood stream being along certain lands, it is not competent for the proprietors of those lands to obstruct that old course by a sort of new waterway, to the prejudice of the proprietor on the other side." In *Attorney-General v. Earl of Lonsdale*, L. R., 7 Eq. 387; 20 L. T. 64, it was attempted to extend the sea doctrine to the case of a tidal river, but Vice-Chancellor Malins refused to so extend it on the authority of *Menzies v. Breadalbane*, supra, saying that Lord Eldon put that case upon the general law of England. In *Mason v. Railway Co.*, L. R., 6 Q. B. 581, we find a *dictum* by Blackburn, J., as follows: "Before the canal was made, the person whose estate the plaintiff now has, had the ordinary rights and liabilities of a riparian owner on the banks of a natural stream. He was entitled to have the water flow to him in its natural state, so far as that was a benefit — as, for instance, to turn his mill, or water his cattle; and he was bound to submit to receive the water, so far as it was a nuisance, as by its tendency to flood his lands." *Lawrence v. Railroad Co.*, 4 Eng. Law & Eq. 265; 16 Q. B. 643, is considerably in point. A railway was constructed across certain low lands adjoining a river, over which the flood-waters used to spread themselves. These low lands were separated from the plaintiff's lands by a bank, constructed under certain drainage acts, which protected the plaintiff's lands from floods. By the construction of the railway the flood-waters could not spread themselves as formerly, but were penned up and flowed over the bank upon the plaintiff's lands. It was held that an action would lie against the company for the injury.

Patteson, J. said: "*Prima facie* this would give the plaintiff

a cause of action, and the question is whether the company are protected by their act;'' a question which cannot arise in our law. In connection with the cases of *Rex v. Trafford* and *Lawrence v. Railway Co.*, supra, it must be borne in mind that the first obstruction of the flood-waters there mentioned is, in England, justified by the statute authorizing it, and, therefore, stands on much the same footing as a natural obstruction; but the liability of the other party, who erected the second obstruction without statute authority, springs from the common law. No English authority has been found to controvert these principles, but the text-writers recognize them as settled law. *Woolr. Waters*, 213 (73 *Law Lib.* 212); *Crabb Real Prop.* 420 (54 *Law Lib.* 263); *Michael & W. Gas & Water* (London ed. 1884), pp. 213, 214, 666; *Ang. Water-Courses*, §§ 333, 334; *Gould Waters*, §§ 160, 209.

In grouping the American cases, those tending to sustain the contention of the defendant in error will first be stated. *Taylor v. Fickas*, 64 *Ind.* 167, was much relied upon. There the injury was caused by the obstruction of the passage of driftwood, both owners being on the same side of the river, and the lower owner having planted a row of trees along the dividing line. The opinion, it is true, treats overflow in flood times as surface water, but it will be noticed that nothing is said or decided about changing the course of the water. The facts are obviously different from those in the present case. In *Railroad Co. v. Stevens*, 73 *Ind.* 278, the plaintiff's land was between the river and the railroad embankment. The overflow is treated as surface water, and the road held not liable; but it would seem that the water doing the damage had left the river, never to return. *Turnpike Co. v. Green*, 99 *Ind.* 205, follows the last case. The turnpike was flooded because of an embankment erected by Green to protect his land from overflow, both parties being on the same side. It was held that the company could not recover. But note that the court adverts to the fact that the company did not own the soil over which the pike ran, but merely had an easement therein. *McCormick v. Railroad Co.*, 57 *Mo.* 433, can also be distinguished. Here the overflowing water left the stream permanently, and entered a pond formed thereby and by other surface water, the draining of which pond caused the injury sued for. In *Shane v. Railroad Co.*, 71 *Mo.* 237, the overflow is apparently treated

as surface water, although it had a way, through a slough, back into the stream. But the court applied the civil law, and held the railroad liable.

This case, together with that of *McCormick v. Railroad Co.*, 70 Mo. 359, is overruled, in so far as the civil law was followed, by *Abbott v. Railroad Co.*, 20 Amer. & Eng. R. Cas. 103, and the common law as to surface water returned to. In this last case it is said that the court in the *Shane Case* treated the overflow as part of the stream, and, therefore, that the decision was correct on common-law principles. In the *Abbott Case*, the court expressly assumes the waters to be surface waters. It seems they escaped from the bed of the creek, and flowed over the lands without any return. *Lamb v. Reclamation Dist. (Cal.)*, 14 Pac. Rep'r, 625, is not much in point. The defendant was a public corporation for the purpose of reclaiming the low lands protected by the embankment, which closed up a slough through which an inconsiderable part of the flood-waters escaped into a natural basin. The plaintiff's land lay two miles below, on the opposite side. The court applied the sea doctrine of the common law, and held the company not liable; but the decision is mainly rested on another ground, namely, that the corporation was not liable as for exercising the right of eminent domain; and in view also of the concurring opinions, the case is weak, on the question involved in the case at bar. See below for an earlier decision by the same court looking another way, not noticed in the case above. In *Hoard v. City of Des Moines*, 62 Iowa, 326; 17 N. W. Rep'r, 527, the plaintiff's land was between the river and the embankment, and it was held that the plaintiff had no right to have the flood-waters from the river pass over his land on to that of another, although they finally joined the river again at a point further down. At first view, *Moyer v. Railroad Co.*, 88 N. Y. 351, seems to support the defendant's position; but a close examination shows otherwise. The complaint averred that the damage was caused by the railroad building an embankment on the opposite side of the river. Evidence was offered and objected to, to show damage caused by raising the tracks. It was admitted, the railroad excepting. The referee included in his finding for the plaintiff the damages caused by raising the tracks, as to which the complaint alleged nothing, thus tainting the whole finding

with illegality. The judgment was reversed for the error in admitting said evidence and in said finding. The court say the defendant, as a matter of law, would not be liable for consequential damages caused by the raising of the embankment on the company's own land in a proper and workmanlike manner, citing *Bellinger v. Railroad*, 23 N. Y. 47. This case bases the freedom from liability upon the legislative authority, but concedes that a private individual would be liable under the same conditions. In our law the railroad occupies no better position in this respect than the private individual.

Now will be stated the American cases going to show that the defendant is liable if it has erected the obstruction to the flood-waters of the river, as complained of in this case. The surplus waters do not cease to be part of the river when they spread over the adjacent low grounds, without well-defined banks or channel, so long as they form with it one body of water, eventually to be discharged through the channel proper. Thus it is held, where the waters of a stream disburse themselves over low ground, without any well-marked course, but gather up lower down into a defined channel, they are not surface water while in the dispersed state, and interference with them then gives the injured party a right of action. *Macomber v. Godfrey*, 108 Mass. 219; *Gillett v. Johnson*, 30 Conn. 180; *Briscoe v. Drought*, 11 Ir. C. L. 250; *West v. Taylor*, 16 Ore. 165; 13 Pac. Rep'r, 665. But if it were conceded that the overflow is surface water, it would certainly cease to be such when turned back into the stream by the defendant's obstruction. *Sullens v. Railroad Co.*, 74 Iowa, 659; 38 N. W. Rep'r, 545; *Moore v. Saine*, 75 Iowa, 263; 39 N. W. Rep'r, 390; *Jones v. Hannovan*, 55 Mo. 462; *Railroad Co. v. Archibald (Miss)*, 7 South. Rep'r, 212. Under these authorities, this declaration might be sustained as complaining that the defendant prevented the flood-waters from becoming surface waters, and threw them back across the river upon plaintiff's land. See, further as to surface water, 17 Cent. L. J. 42, 62; Ang. Water-Courses, § 108a et seq.; Gould Waters, § 263 et seq. But it is not necessary to take this view, as the following authorities show the defendant to be liable under the alleged facts: Where the effect of the defendant's dike was to retain on the land of the plaintiff flood-waters from the river longer than they would otherwise remain,

the injury was held actionable, and the demurrer overruled. *Montgomery v. Locke* (Cal.), 11 Pac. Rep'r, 874. Where, in a freshet, the stream broke over one of its banks, carrying a part of it away, it was held that the owner might replace the bank with a dam, provided he did not build higher than the original bank, or otherwise cause the water to flow differently from the natural flow. *Pierce v. Kinney*, 59 Barb. 56. "It is well settled that every person through whose land a stream of water flows may construct embankments and other guards on the bank to prevent the stream washing the bank away, and overflowing and injuring his land. But in doing this he must be careful so to construct them as not to throw the water upon his neighbor's lands, where it would not otherwise go in ordinary floods. If he does, he will be liable for the injury." *Wallace v. Drew*, 59 Barb. 413. There is no distinction in principle or authority between obstructing the flow of a stream at its ordinary level and in time of flood. *Burwell v. Hobson*, 12 Gratt. 222. This case is in point, and holds the defendant liable.

Another case in point is *Crawford v. Rambo*, 44 Ohio St. 279; 7 N. E. Rep'r, 429, holding that flood-water is not surface water, and that interference therewith gives a right of action. So, *Byrne v. Railroad Co.* (Minn.), 36 N. W. Rep'r, 339, holds that overflow in times of high water is not surface water, and the railroad is liable for obstruction of such water by an embankment erected on its own land. See, also, *Rau v. Railroad Co.*, 13 Minn. 442 (Gil. 407), where the railroad made an extensive excavation on its own land, into which overflow waters from the Mississippi river entered, to the damage of an adjoining owner. The railroad was liable. *Gerrish v. Clough*, 48 N. H. 9; 97 Am. Dec. 561, and notes, and *Tuthill v. Scott*, 43 Vt. 525, seem not to involve the question as to the action of the water in times of flood, but are adverse to defendant as far as they go. In *Carriger v. Railroad Co.*, 7 Lea, 383, the railroad embankment did not affect the usual flow of the streams, but obstructed the flood channel, and threw the excessive waters upon the plaintiff's lands. This same defendant contended that they were surface waters, which it had a right to obstruct. The trial court gave judgment for the defendant, holding "that the overflow in question resulted from accumulations of surface water caused by extraordinary rains, and

that the law relating to surface water, and not that of running streams, governs the case. The supreme court said: "The question to be determined is, is this such surface water as to relieve the defendant? * * * The springs and their branches are never failing, and flow off in a northward direction, toward the farm of plaintiff. In ordinary times they find outlets through the caverns or sinks in the earth. In extraordinary times their volumes are too great for the usual place of discharge. These springs and branches are sometimes large and sometimes small; still they are the same springs and branches, requiring, as all running streams do, sometimes less and at other times more surface for their escape. * * * If the embankment had been erected in a valley, near a low bank of the river, which overflowed at high tide, but escaped in one passage, so as not to materially injure adjoining lands, but, if obstructed by the embankment, would overflow and damage, as in this case, we think it would not be insisted that it was not obligatory on the defendant to build a culvert to prevent damage that must certainly come with the high tide. Is there a difference in reason as to the case put and the one at bar? We think not. While they may not be so frequent, the overflows from the branches are as certain as those from the river; one is as certainly a constant running stream as the other. * * * It is no defense for it to say that it was only in extraordinary times that the injuries now complained of could result. The rises in the waters had for all time occurred at intervals before the building of the road, and it was to be conclusively presumed they would occur afterward from similar causes." The court entered judgment for the plaintiff. This is a stronger case than the one now to be decided.

Counsel for defendant ably and strenuously insist that the common, and not the civil law be applied to this case. The above authorities prove that the common law does not regard the waters here complained of as mere surface water, but as a part of the river. The civil law might be more favorable to the defendant's case; for it seems to regard the flood-waters of a river as a common enemy, against which each riparian owner may build defenses with impunity. *Mailhot v. Pugh*, 30 La. Ann. 1359, citing authorities. The defendant also claims that the question is settled by an act of the legislature, and cites section 2232 of the

Code. That section says: "All persons owning, or who may hereafter own, lands on any water-courses in this State, are authorized and empowered to ditch and embank their lands, so as to protect the same from freshets and overflows in said water-courses; provided, always, that the said ditching and embanking does not divert said water-course from its ordinary channel; but nothing shall be so construed as to prevent the owners of land from diverting unnavigable water-courses through their own lands." This contention may be answered in three ways: First. The declaration in this case distinctly alleges that the defendant did divert the river from its ordinary channel, for which act the statute affords no shadow of protection. Secondly. The allegations of the declaration do not show that defendant embanked its land "so as to protect the same," but constructed an embankment on which to lay its track, without regard to any consequences of benefit or injury to the contiguous country. Thirdly. The construction long ago and repeatedly put by this court on the last part of the section, which says: "Nothing shall be so construed as to prevent the owners of land from diverting unnavigable water-courses through their own lands," necessitates the conclusion that this whole statute is not alterative, but only declaratory, of the common law. In other words, the legislature did not intend to give riparian owners the privilege of ditching or embanking their lands, or of diverting unnavigable water-courses, so as to injure neighboring proprietors, without liability therefor. Indeed, the power of the legislature so to alter the common law is expressly denied in *Persons v. Hill*, 33 Ga. Supp. 143. And in *Cheeves v. Danielly*, 80 Ga. 118; 4 S. E. Rep'r, 902, the same view is taken as to the intention of the legislature in passing this act. It is true, these cases deal with the diversion of an unnavigable stream, but it would be absurd to impute to the legislature two conflicting intentions in the same act; and the ground taken in *Persons v. Hill* will equally well support the same rule of construction as to the other branch of the statute. The facts in *Persons v. Hill* require notice. The owners were on the same side of the Flint river, into which Beaver creek emptied after passing through the defendant's land. By mutual agreement between the upper owner (plaintiff) and the lower owner (defendant), the expense being also shared, an embankment was erected along the

river to keep back the flood-waters which, from the facts of the case, seem to have this course — that is to say, coming out on plaintiff's land, they flowed across the same over defendant's land into the creek, by which they would empty back into the river. The embankment not being kept up according to the agreement, defendant proposed to protect himself by diverting the creek through a canal on his own land to the river and building an embankment along his side of the canal. This canal would make an opening through the high bank of the river, and, with the embankment, would allow and cause the high waters to back up on the plaintiff's land. This court granted an injunction against the construction of the canal, but allowed the defendant to continue the embankment. One great difference from the present case might be found in the agreement for consideration to have the common protection of the first embankment. See *Railway v. Lawton*, 75 Ga. 192. But at any rate the decision does not contemplate that defendant's individual embankment would injure the plaintiff's land, such an inference being inconsistent with the plain language of the opinion on page 197.

There is another section of the Code, not cited or discussed in the argument, which deserves mention in this connection: "No person shall be permitted to make or keep up any dam to stop the natural course of any water, so as to overflow the lands of any other person, without his consent; nor shall any person stop or prevent any water from running off of any person's field, whereby such person may be prevented from planting in season, or receive any other injury thereby; nor so as to turn the natural course of any water from one channel or swamp to another, to the prejudice of any person." Code, § 1607. This statute was passed September 29, 1773, and apparently revived by the act of February 25, 1784 (*Marbury & C. Dig.*, p. 404), being recognized by subsequent amendments and by the Codes. Acts 1855-56, p. 12; Acts 1865-66, p. 27. It is put in the Code under the head "Cultivation of Rice," but from reading the original act (*Marbury & C.*, p. 178) it is by no means clear that it was intended to apply only on rice farms. Neither the title nor the body of the act contains the slightest intimation to that effect. Its terms are as broad and general as they well could be. The preamble, it is true, in stating the mischiefs to be remedied, describes such as probably were

common in the localities where rice was cultivated, though even here there is no distinct allusion to rice culture. These mischiefs may, as a matter of history, have occasioned the enactment of the statute. But might not the legislature have deemed it wise to pass a general law, applicable in all portions of the state where similar mischiefs were likely to happen? It is not inconsistent with the purposes of an act for curing a special class of mischiefs to provide therein a remedy at the same time for all mischiefs of that genus. On the contrary, that would be a highly proper mode of legislation. If the preamble is not to be given a controlling and restrictive effect, this act alone would completely and effectually dispose of the present case, as the declaration alleges acts by the defendant which violate the law in question if it was intended to have a general application. But, since it is unnecessary for the purposes of this case to measure the extent of this statute, the question is not decided, especially as it deserves more argument and consideration.

It was urged in the argument that the law ought to encourage the reclaiming and improvement of lands which are subject to injury from the natural action of floods and surface water, and it is surprising to find this argument unquestioningly relied upon in many cases which are supposed to follow the common law of surface water. The error therein is easily exposed, for to the same extent as the land of an adjoining owner is damaged by the improvement on the defendant's land, so far exactly is the development of the damaged land set back and retarded. The defendant might bring his land to perfection for his uses, and then have all that good work ruined by the first measures of improvement adopted by his less progressive neighbor. The rule contended for by the defendant would be a poor encouragement to painstaking labor engaged in reclaiming unprofitable land. Every one is charged with notice of nature's operations; but who can tell when a man will build his bulwarks against the flood? There is no public policy to allow one land-owner to improve his condition at the cost of his neighbor; but the improver must at his peril see to it that the benefit to himself is large enough to pay both him and his neighbor's damage, if any. The law does not look to the interest of one individual, but recognizes and enforces the duties implied in his relation to others. Of course, for these

principles to apply, there must be as in this case an invasion of some tangible right. *Peel v. City of Atlanta*, 55 Ga. 138; 11 S. E. Rep'r, 552. And it must not be understood that this discussion rules any thing beyond the questions contained in this particular case. Undoubtedly there is a class of rare cases not within the general rule, as indicated by the eloquent language of Agnew, J., in *Railroad Co. v. Gilleland*, 56 Penn. St. 452, where he says: "There is, therefore, no liability for extraordinary floods — those unexpected visitations whose comings are not foreshadowed by the usual course of nature, and must be laid to the account of Providence, whose dealings, though they may afflict, wrong no one." But such is not the case made by this declaration. For the foregoing reasons it is evident that the court erred in sustaining the demurrer to the declaration. Judgment reversed.*

Eminent domain — damages by interfering with the flow of streams and surface water.— This subject is treated by the writer in his work on Eminent Domain, sections 60-61. Sections 66 and 89 apply especially to the facts of the foregoing case.

CLARK V. BEVER.

(Supreme Court of the United States, March 2, 1891.)

1. STOCK AND STOCKHOLDERS. REMOVAL OF CASES. The statute of a state giving the state court exclusive jurisdiction of the settlement of claims against the estates of deceased persons, cannot affect the right to remove to the federal court, on the ground of diverse citizenship, a suit commenced in the state court to establish a claim against an administrator.

2. JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES. AMOUNT INVOLVED. The jurisdiction of the supreme court of the United States of an appeal from a decree refusing to allow a claim for more than \$5,000, against an administrator, all of which was disputed, cannot be questioned on the ground that it does not appear that the estate, when distributed, will yield for plaintiff's claim as much as \$5,000.

3. LIABILITY OF STOCKHOLDER FOR UNPAID BALANCE WHEN STOCK IS TAKEN AT A DISCOUNT IN PAYMENT OF A DEBT. A creditor who, in good faith, takes from an insolvent corporation its stock, which is wholly worthless, cannot be held liable to other creditors for the difference between the price for which he took the stock and its face value, under Revision Iowa, 1880, title 10, chapter 53, making stockholders of a corporation liable to creditors for the amount of the unpaid installments on the stock owned by them.

* Reported in 12 S. E. Rep'r, 429; 87 Ga. 246.

IN ERROR to the circuit court of the United States for the southern district of Iowa.

In the year 1872, the Burlington, Cedar Rapids and Minnesota Railway Company — of which at the time the intestate, George Greene, was president, as well as a stockholder, and of which he continued to be president until February, 1875 — had a settlement with the Northwestern Construction Company, of which also Greene was a member, for work done in building a part of its road. This settlement showed the sum of \$70,000 to be due the construction company. The railway company, being unable to pay this claim in money, delivered to the construction company three thousand five hundred shares of its stock, at twenty cents on the dollar, each share being for \$100, and the same was accepted in full satisfaction of the debt. The stock, which was not worth any thing in the market, was issued directly to the members of the construction company, the intestate Greene receiving nine hundred and ten shares as his portion. No other payment than this twenty per cent was made for or on account of the stock. The good faith of the parties in making this arrangement is not impunged by allegation or proof. The construction company was reluctant to take the stock, and insisted upon payment in cash. What the original stockholders paid for their shares does not appear; nor does the record show whether or not Greene exercised any of the privileges of a stockholder.

Prior to the above settlement a resolution was adopted February 7, 1871, by the executive committee of the railway company, to the effect that, in the adjustment or liquidation of claims against the company, the treasurer be authorized to use its stock, if not less than twenty per cent of its par value could be realized for the purpose. At the time the stock was issued to Greene the financial condition of the company was as follows: The bonded indebtedness of its main line was \$5,400,000; its floating debts over \$1,000,000; its net earnings in 1871 and 1872 and subsequently were not sufficient to meet the interest on its bonded debts; and in March, 1872, when the settlement in question was made, it was without means to pay its floating debt or the interest on its bonded debt, except from net earnings and such money as could be realized from its stock and bonds and by borrowing. The railway company continued to operate the road until May

19, 1875, on which day, in a suit brought in the United States circuit court for the district of Iowa to foreclose mortgages given by it to secure outstanding bonds, a receiver of its property was appointed. At this time the general condition of the company was this: Its bonded debt was \$10,400,000, upon which no interest had been paid since November 1, 1873, and its floating debt amounted to \$1,250,000, and it had no means with which to pay it. In the above suit a sale under a decree of foreclosure was made in July, 1876, when the railroad and all its property were purchased and have since been owned by the Burlington, Cedar Rapids and Northern Railway Company. After the appointment of the receiver, the Burlington, Cedar Rapids and Minnesota Railway Company ceased to do business or to exercise its franchises as a corporation.

It should be stated, in this connection, that Greene on the 10th of February, 1875, transferred the above nine hundred and ten shares to John I. Blair, a gentleman of large fortune and financially responsible for the balance, if any, due on that stock. At the instance of the western managers of the Burlington, Cedar Rapids and Minnesota Railway Company, Mr. Blair undertook to save it from bankruptcy. But, ascertaining that the company's over-issue of bonds was so great and its liabilities so large that it was necessary to commence foreclosure proceedings and to make application for the appointment of a receiver, he returned to Greene and others all the stock received by him.

Clark, the plaintiff below, a citizen of Ohio, being the holder of fifty gold bonds of \$1,000 each of the Burlington, Cedar Rapids and Minnesota Railway Company, dated June 1, 1874, payable in the year 1914, and bearing interest at seven per cent per annum, which bonds were part of a series of two thousand each, for \$1,000 secured by mortgage upon the company's net income, rolling stock and additions, and convertible at the option of the holder into capital stock, brought suit to recover the amount due thereon, and on the 4th of June, 1878, recovered judgment against the railroad company for the sum of \$65,517 to bear interest from that date. We infer, though the record contains no distinct statement or proof on the subject, that the bonds became due and payable prior to this suit on account of default in the payment of interest. Execution was issued upon the judg-

ment, and was returned August 10, 1880, "No property found." The present suit was commenced July 5, 1881, by Clark against the administrator of Greene, a citizen of Iowa, in the circuit court for Linn county in that state. The petition, after setting out the foregoing judgment, the return of the execution thereon unsatisfied, and the ownership of the nine hundred and ten shares of stock by Greene up to his death, and by his estate since, alleged "that of the value of said shares of stock owned by said decedent there has been paid only the sum of \$18,200, or about twenty per centum of the full value of said stock, and there is still due upon said shares a balance of eighty per centum of their full value, amounting to the sum of \$72,800; that said balance due upon said shares was a trust fund in the hands of said decedent for the payment of said judgment, and is still a trust fund for the purpose in the hands of decedent's administrator; that the defendant herein is the administrator of the estate of said George Greene, deceased, duly appointed and qualified; that said decedent in his life-time failed and neglected to pay or cause to be paid the said judgment, or any part thereof, and this defendant has failed and neglected to pay or cause to be paid the same, or any part thereof, and the said judgment is still due and wholly unpaid." The prayer of the petition was for a judgment against the defendant as administrator for the whole amount of the plaintiff's claim, with interest and costs, and that it be allowed by the court as a just claim against Greene's estate.

The case was subsequently removed, upon the petition of Clark, to the circuit court of the United States for the district of Iowa, and thereafter by consent was transferred to the eastern division of the southern district of that state.

The defendant, besides denying each allegation of the plaintiff's claim and petition, pleads, in bar of the action, the statute of limitations of Iowa, and also a certain settlement and compromise between the plaintiff and the railway company. To this answer a replication was filed by the plaintiff.

After the evidence was concluded the plaintiff asked several instructions based upon the general ground that the stock used in discharging the debt of the construction company was a trust fund for the benefit of creditors, and that, without reference to the necessities of the railroad company or the good faith of the

transferred. Greene was accountable to the creditors of the latter corporation for the par value of the stock issued to him under the settlement of composition of 1871, whatever may have been its market value at the time he got it or at the time this action was commenced.

The court below refused to so instruct the jury, and held in favor of Mr. Clark upon the evidence. The learned Justice, Greene, by taking the time limited and the shares of stock upon which the twenty per cent was paid, did not become liable to pay any thing further or assume himself to creditors of the railway company; and pursuant to its direction, the jury returned a verdict for the defendant. *Clark v. Bever*, 31 Fed. Rep'r, 673.

P. H. Smyth for plaintiff in error. *Clm. A. Clark* for defendant in error.

Mr. Justice HARLAN, after stating the facts in the foregoing language, delivered the opinion of the court.

The questions to be first considered relate to the jurisdiction of the court below and of this court.

This proceeding was commenced in one of the circuit courts of Iowa, having general original jurisdiction in all civil actions and special proceedings, and original exclusive jurisdiction, in the respective counties of the state, among other things, "of the settlement of the estates of deceased persons." Of the filing of a claim against the estate of a deceased person, the executor or administrator is entitled to notice to be served "in the manner required for commencing ordinary proceedings," unless the claim be expressly admitted in writing with the approbation of the court, and when not so admitted "the court may hear and allow the same, or may submit it to a jury." On such hearing, unless otherwise declared, the court is governed by the provisions of law applicable to an ordinary proceeding. When a claim is allowed, it is "placed in the catalogue of established claims, but shall not be a lien." Code Iowa 1873, §§ 161, 2312, 2370, 2403, 2411, 2416. No other court of the state, except a circuit court, has jurisdiction to allow or disallow a claim against the estate of a deceased person. *Tillman v. Bowman*, 65 Iowa, 450; 27 N. W. Rep'r, 377; *Shropshire v. Long*, 65 Iowa, 539; 27 N. W. Rep'r, 737. While an order allowing such a claim is not an ordinary judgment upon

which an execution may issue, it is an "adjudication" establishing that claim as one to be paid by the executor or administrator so far as the estate in his hands is sufficient. *Foteaux v. Lepage*, 6 Iowa, 123; *Voorhies v. Eubank*, 6 Iowa, 274; *Little v. Sinnett*, 7 Iowa, 324; *Smith v. Shawhan*, 37 Iowa, 585; *Dessaint v. Foster*, 72 Iowa, 640; 34 N. W. Rep'r, 454. It is suggested that the claim in suit here is a mere incident to the marshaling and distribution of the estate of Greene; that such estate can only be administered and distributed by the state court in accordance with the laws of the state; and that the circuit court of the United States was without jurisdiction to determine whether it was or not a valid claim against that estate. This position is wholly untenable. As the proceeding involved a judicial determination as to the liability of Greene's estate for the amount of Clark's claim, with parties before the court to contest all the questions of law and fact, it was clearly a "suit," within the meaning of the act of congress providing for the removal of suits to the circuit courts of the United States.

The removal in this case was, therefore, proper, unless it be competent for a state, by legislative enactment conferring upon its own courts exclusive jurisdiction of all proceedings or suits involving the settlement and distribution of the estates of deceased persons, to exclude the jurisdiction of the courts of the United States even in cases where the constitutional requirement as to citizenship is met. But this court has decided, upon full consideration, that no such result can be constitutionally effected by state legislation. The case of *Hess v. Reynolds*, 113 U. S. 73, 77; 5 Sup. Ct. Rep'r, 377, involved a disputed claim originally filed in a probate court of Michigan, carried by appeal to a circuit court of the same state, and subsequently removed to the circuit court of the United States for the district of Michigan. Substantially the same question of jurisdiction was raised in that case that is here presented. This court said: "It may be convenient that all debts to be paid out of the assets of a deceased man's estate shall be established in the court to which the law of the domicile has confided the general administration of these assets. And the courts of the United States will pay respect to this principle, in the execution of the process enforcing their judgments out of these assets, so far as the demands of justice require. But

neither the principle of convenience, nor the statutes of a state, can deprive them of jurisdiction to hear and determine a controversy between citizens of different states, when such a controversy is distinctly presented, because the judgment may affect the administration or distribution in another form of the assets of the decedent's estate. The controverted question of debt or no debt is one which, if the representative of the decedent is a citizen of a state different from that of the other party, the party properly situated has a right, given by the constitution of the United States, to have tried originally or by removal in a court of the United States, which cannot be defeated by state statutes enacted for the more convenient settlement of estates of decedents." See, also, *Payne v. Hook*, 7 Wall. 425; *Boom Co. v. Patterson*, 98 U. S. 403; *Ellis v. Davis*, 109 U. S. 485; 3 Sup. Ct. Rep'r, 327; *Delaware Co. v. Safe, etc., Co.*, 133 U. S. 473, 487; 10 Sup. Ct. Rep'r, 399; *Upshur Co. v. Rich*, 135 U. S. 467, 477; 10 Sup. Ct. Rep'r, 651.

It is next contended that, under the statutes of Iowa governing the settlement of the estates of deceased persons, the plaintiff in error has only an interest in the "fund" arising from Greene's estate; and as it does not appear, affirmatively, that such interest exceeds, or can exceed, in value the sum of \$5,000, this court is without jurisdiction, and the writ of error should be dismissed. This contention must be overruled.

The plaintiff seeks a judgment against the estate of Greene for the sum of \$65,523.20, with interest. The defendant disputes the whole of that claim. The sum sued for — the entire claim having been rejected — is the value of the matter in dispute here; and our jurisdiction to determine that dispute cannot depend upon an inquiry as to whether the estate of Greene, when fully distributed, may or may not yield to the plaintiff, if successful here, something in excess of \$5,000. Such an inquiry is as inadmissible, on this writ of error, as it would be if the judgment had established the claim of the plaintiff against Greene's administrator for the full amount, and a writ of error had been prosecuted by him to reverse that judgment. The case is different from *Miller v. Clark*, 138 U. S. 223, where the appeal was dismissed, because it appeared, affirmatively, that the appellant, who was the plaintiff below, did not claim, and could not possibly recover, for himself, a sum in excess of \$5,000.

We come now to consider the principal questions in the case. They relate to the liability of the defendant for the difference between the face value of the stock issued to Greene in 1872, and the value at which it was rated in the settlement of that year with the Burlington, Cedar Rapids and Minnesota Railway Company. The general proposition advanced by the plaintiff is that it was not competent for the railway company to issue to Greene and his associates in discharge of its debt to them, amounting to \$70,000, three thousand five hundred shares of stock of the par value of \$350,000, although the settlement upon that basis may have been demanded by the best interests of the company, and was made in good faith, without intention to harm the corporation or to defraud its creditors, existing or subsequent, and although the stock at the time "was not worth any thing in the market;" and that Greene took the nine hundred and ten shares issued to him for twenty per cent of its face value, subject to the implied condition that he should be liable for any unpaid debts of the corporation to the extent of the difference between the face value of the stock and the amount at which it was taken by him. It is not contended that such liability arises from the relations Greene held to the two companies making the settlement of 1872, but from the obligations the law imposed for the benefit of creditors both upon the corporation issuing the stock and its stockholders. Of course under this view, every one having claims against the railway company—even laborers and employees—who could get nothing except stock in payment of their demands, became bound by accepting stock at its market value in payment, to account to unsatisfied judgment creditors for its full face value, although at the time it was sought to make them liable, the corporation had ceased to exist, or its stock had remained, as it was when taken, absolutely worthless. Such, the plaintiff in effect, insists is the law of Iowa.

The statutory provisions that are supposed by the plaintiff to sustain his position, which were in force when the stock in question was issued, are found in title 10, chapter 52, of the Revision of the Statutes of Iowa of 1860, relating to the creation of corporations for the transaction of any lawful business, including the establishment of ferries, the construction of canals, railways, bridges or other works of internal improvement. Section 1150. Among the powers which such corporations may exercise are "to

make contracts, acquire and transfer property, possessing the same powers in such respects as private individuals now enjoy" and to establish by-laws, and make all rules and regulations deemed expedient for the management of their affairs in accordance with law, and not incompatible with an honest purpose." Section 1151. Articles of incorporation were required to be recorded in the office of the recorder and secretary of state. Section 1152. A notice of the incorporation must be published, containing the name of the corporation and its principal place of transacting business; the general nature of such business; the amount of capital stock authorized, and the terms and the conditions on which it is to be paid in; the time of the commencement and termination of the corporation; by what officers or persons the affairs of the corporation are to be conducted, and the times at which they will be elected; the highest amount of indebtedness or liability to which the corporation is at any time to subject itself; and whether private property is to be exempt from corporate debts. Sections 1154, 1155. A failure to comply with the above and other provisions, in relation to organization and publicity, rendered the individual property of all the stockholders liable for the corporate debts, except that stockholders in railway companies were made liable only for the amount of stock held by them in such companies. Sections 1166, 1338. Intentional fraud in failing to comply substantially with the articles of incorporation, or in deceiving the public or individuals in relation to their means or their liabilities, subjected those guilty thereof to fine and imprisonment, or both, at the discretion of the court. Section 1163. The practice of fraud in the manner mentioned caused a forfeiture of all the privileges conferred, and the courts could proceed, upon information, to wind up the business of the corporation. Section 1167. A copy of the by-laws of the corporation, and a statement of the amount of capital stock subscribed, the amount actually paid in, and the amount of the indebtedness in a general way, was required to be kept posted up in the principal places of business, subject to public inspection, such statement to be corrected as often as any material change took place in relation to any part of the subject-matter of the statement. Sections 1161, 1162.

The provisions upon which the plaintiff particularly relies are the following:

"§ 1169. The transfer of shares is not valid, except as between the parties thereto, until it is regularly entered on the books of the company so far as to show the name of the persons by and to whom transferred, the number or other designation of the shares, and the date of the transfer; but such transfer shall not in any way exempt the person or persons making such transfer from any liability or liabilities of said corporation which were created prior to such transfer. * * *

"§ 1172. Nothing herein contained exempts the stockholders of any corporation from individual liability to the amount of the unpaid installments on the stock owned by them or transferred by them for the purpose of defrauding creditors, and execution against the company may to that extent be levied upon such private property of any individual.

"§ 1173. In none of the cases contemplated in this chapter can the private property of the stockholders be levied upon for the payment of corporate debts while corporate property can be found with which to satisfy the same, but it will be sufficient proof that no property can be found if an execution has issued on a judgment against the corporation, and a demand thereon made of some one of the last acting officers of the body for property on which to levy, and if he neglects to point out any such property.

"§ 1174. The defendant in any stage of a cause may point out corporate property subject to levy, and upon his satisfying the court of the existence of such property, by affidavit or otherwise, the cause may be continued or execution against him stayed until the property can be levied on and sold, and the court may subsequently render judgment and order execution for any balance which there may be after disposing of the corporate property according to the stage of the cause; but if a demand of property has been made, as contemplated in the preceding section, the costs of such proceedings shall in any event be paid by the company or by the defendant."

These provisions are substantially preserved in the Iowa Code of 1873, sections 1058, 1059, 1062, 1063, 1068, 1071, 1078, 1082-1084.

The argument in behalf of the plaintiff assumes that, consistently with these statutory provisions, no one can, under any circumstances whatever, become the owner of the stock of an Iowa

corporation, except subject to the condition that, where property of the corporation cannot be found, the private property of the stockholder may be seized under execution in favor of a judgment creditor to the extent of the difference between what he actually paid for the stock, whether in money or in property, and its face value. And it is further insisted that, independently of the statute, such is the doctrine of general law relating to subscriptions to the stock of corporations, as announced by this court in several cases. We are of opinion that neither of these positions can be maintained.

The local statute undoubtedly proceeds upon the ground that unpaid installments of stock subscribed constitute — no other rule being prescribed by legislative enactment — a trust fund for the benefit of the creditors. But it does not declare that a corporation is without power, under any circumstances whatever, to dispose of its stock at less than par, or that stock purporting to be full paid shall, in all cases, and without reference to the circumstances under which it was acquired, be deemed unpaid to the extent that the amount given for it by the owner, whether in money or in property, was less than its face value. On the contrary, the statute itself imposes no express restriction upon the disposition by a corporation of its stock except such as is imposed upon individuals, and prescribes no rule in respect to the liability of a stockholder to creditors except that when corporate property cannot be found to pay a judgment creditor his private property may be seized under the execution to the extent of any unpaid installments on the stock owned by him. Whether any such indebtedness really exists upon the part of a particular stockholder, and whether he in law or in fact owes any sum on the stock held by him, was left by the statute to be determined in each case, upon its own circumstances, and in accordance with the principles of general law touching the rights and liabilities of creditors and stockholders. If the legislature had intended that the acquisition of stock at less than its face value should be conclusive evidence in every case that the stock, as between creditors and stockholders, is “unpaid,” it would have been easy to so declare, as has been done in some of the states. If such a rule be demanded by considerations of public policy, the remedy is with the legislative department of the government creating the corporation. A rule so explicit and

unbending could be enforced without injustice to any one, for all would have notice from the statute of the will of the legislature. It is not for the courts, by mere interpretation of a statute, not justified by its language, to accomplish objects that are within the exclusive province of legislation. If, when receiving the nine hundred and ten shares of stock in payment of his portion of the claim of \$70,000 against the railroad company, Greene had supposed that he would thereby become liable to account to creditors for its full face value without regard to the real value of the stock, and whether the corporation subsequently became bankrupt or not, he certainly would not have taken it. It is equally certain that no such result was contemplated by the other party to the settlement. It is also certain that the acceptance by the members of the construction company of worthless stock in full discharge of its claim was a benefit to both the existing creditors and the holders of stock of the railroad company not paid in full; to creditors, because it diminished the number of that class who would be entitled to share in the assets of the company; to stockholders so situated, because it lessened the number of creditors to whom, in any contingency, they would be liable in their private property for the debts of the corporation. Here was a corporation which, at the time of the settlement of 1872 with Greene and his associates, was unable from its net earnings to pay the interest on its bonded debt. It could not pay even its floating debt without borrowing money or making sale of stock. But its stock could not be sold for money. It had no market value, and the company could not get rid of the debt due for construction except by borrowing money or selling stock.

.If it had borrowed money and secured the payment by mortgage upon its real property or income, it would thereby have added to the burdens of creditors and original stockholders. So far as the record discloses, it did in good faith what was best for all then concerned in the railroad company, namely, paid off a large claim for construction with worthless stock, those to whom it was issued taking their chances that it might at a future time acquire some value, but with the certainty that if the railroad company became bankrupt and ceased to do business all of its assets would be appropriated by creditors, leaving nothing whatever to stockholders.

Do the decisions of this court require us to hold, in such a case, that a creditor taking stock in payment of his claim is bound to other creditors for the face value of the stock? The plaintiff contends that our decisions are to that effect. Let us see. In *Sawyer v. Hoag*, 17 Wall. 610, 620, it was held that the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund *sub modo* for the benefit of its general creditors. And this principle was reaffirmed in *Upton v. Tribilcock*, 91 U. S. 45; *Sanger v. Upton*, 91 U. S. 56; *Webster v. Upton*, 91 U. S. 65; *Pullman v. Upton*, 96 U. S. 328; *Chubb v. Upton*, 95 U. S. 665; *Morgan Co. v. Allen*, 103 U. S. 498; *Scovill v. Thayer*, 105 U. S. 143; *Hawkins v. Glenn*, 131 U. S. 319, 335; 9 Sup. Ct. Rep'r, 739; and *Richardson v. Green*, 133 U. S. 30, 45; 10 Sup. Ct. Rep'r, 280. There is no dispute here as to the soundness of this general principle. The dispute is as to its application to a case like the present one. We can be aided in solving this inquiry by ascertaining the character of the particular cases in which it has been applied by this court. In *Sawyer v. Hoag*, a subscription of \$5,000 to the stock of an insurance company for which the subscriber paid in full, but received in return the check of the corporation for \$4,250 under an agreement that the debt for the stock should be extinguished, and the amount of the check should be treated simply as a loan of money to the stockholder, was held to be a mere device to evade the rule that unpaid subscriptions of stock constitute a trust fund for the benefit of the creditors of the corporation; consequently, that the stock there in question was to be regarded, as between the corporation and creditors, to be unpaid to the extent of the amount received back from the corporation under the pretense of a loan. In *Upton v. Tribilcock*, an actual subscriber to the stock of an insurance company upon which he agreed to pay twenty per cent, was held responsible for the balance, and could not escape liability therefor because of representations by the agent, at the time of the subscription, that he would be only responsible for that amount, or by proving a subsequent arrangement with the company canceling the subscription and accepting, as in full payment, his note for the twenty per cent agreed to be paid. *Sanger v. Upton* was another case of the actual subscription of stock upon which the subscriber was held to pay the full sum subscribed.

In *Webster v. Upton* a person holding certificates of stock by transfer from the original subscriber, and standing upon the books of the corporation as a stockholder, was held liable for the balance due upon the stock, without proof of an "express" promise upon his part to pay. In *Chubb v. Upton* the decision was that one receiving a certificate of stock for a certain number of shares, at a given sum per share, thereby became liable to pay the amount thereof when called upon by the corporation or its assignee in bankruptcy; and in *Pullman v. Upton*, that a transferee of stock who caused the transfer to be made to himself, as collateral security for a debt of the transferrer, was liable for the balance due on such stock. The doctrine of the latter case was approved in *Hawkins v. Glenn*. In *Morgan Co. v. Allen* it was decided that the subscription by a county to the capital stock of a railroad company, together with the bonds given therefor, constituted with other property of the company a trust fund, to which all its creditors could rightfully look for satisfaction of their claims; and that by no device or combination, to which particular creditors were parties, could it withdraw its bonds from that fund, and thereby avoid liability to the general creditors of the company. In *Scovill v. Thayer* it was declared, among other things, that a contract between a corporation and its stockholders, that they should never be called upon to pay any other assessment than that paid at the outset, while good as between the corporation and the stockholders, was a fraud in law upon creditors, which they could have set aside whenever their rights intervened and their claims were unsatisfied. In *Richardson v. Green* it was held that the issuing by a corporation of bonus stock was in violation of a statute of the state declaring it to be unlawful to issue certificates of stock until the shares were fully paid, and that one exercising the privileges and powers of a stockholder in a corporation was not exempt from the liabilities attaching to a *bona fide* stockholder who took shares purporting to be, but which in fact were not, fully paid.

This detailed statement of the above case has been made because of the confident assertion that they rest upon doctrines necessarily requiring the reversal of the judgment. We do not concur in this view. In all of these cases, except one, there was an actual subscription of a given amount. They were cases of prom-

ises to pay the company the amount subscribed, not of sales by it. According to those cases a stockholder, becoming such by formal subscription or by transfer upon the books of the corporation, cannot be discharged to the injury of creditors by any agreement, arrangement or device to which creditors do not give their assent, and by which the stockholder is to pay less than the amount due upon such stock; this upon the ground stated in *Webster v. Upton*, that "neither the stockholders nor their agents, the directors, can rightfully withhold any portion of the stock from the reach of those who have lawful claims against the company," and that "the stock thus held in trust is the whole stock, not merely that percentage of it which has been called in and paid." The present case presents features that are not to be found in the others. It is not the case of an ordinary subscription of stock in a given amount. Nor is it, strictly, one of an ordinary purchase of stock for purposes of investment. It is the case of a creditor of an insolvent railroad corporation which, in consequence of its inability to pay creditors in money, was threatened with bankruptcy, and which refused or was unable to pay except in stock that was without market value. To say that a public corporation, charged with public duties, may not relieve itself from embarrassment by paying its debt in stock at its real value — there being no statute forbidding such a transaction — without subjecting the creditor, surrendering his debt, to the liability attaching to stockholders who have agreed, expressly or impliedly, to pay the face value of stock subscribed by them, is, in effect, to compel them either to suspend operations the moment they become unable to pay their current debts, or to borrow money secured by mortgage upon the corporate property. We do not think the statute of Iowa can be properly construed to cause such a result in respect to corporations organized under its laws.

We must not be understood as modifying in any respect the principles laid down in the cases above cited, nor the salutary rule laid down in *Sawyer v. Hoag*, that when the interest of the public or of strangers is to be affected by any transaction between the stockholders owning the corporation and the corporation itself, "such transaction should be subject to a rigid scrutiny, and, if found to be infected with any thing unfair toward such third person calculated to injure him, or designed intentionally and in-

equitably to screen the stockholder from loss at the expense of the general creditor, it should be disregarded or annulled so far as it may inequitably affect him." These principles were reaffirmed in *Richardson v. Green*, and should not be relaxed in any case in which they may be applied consistently with justice. So, when the interest of creditors require, those who hold shares of stock in a corporation, purporting to be, but which are shown not to have been, paid for to the extent of their face value, should be held liable to pay for such shares in full, unless it appears that they acquired the stock under circumstances that did not give creditors and other stockholders just ground for complaint. As said by this court in *Peters v. Bain*, 133 U. S. 670, 691; 10 Sup. Ct. Rep'r, 354, "unpaid subscriptions to stocks are assets, and have frequently been treated by courts of equity as if impressed with a trust *sub modo*, in the sense that neither the stockholders nor the corporations can misappropriate subscriptions so far as creditors are concerned." See, also, *Graham v. Railroad Co.*, 102 U. S. 148, 161; *Railroad Co. v. Ham*, 114 U. S. 587, 594; 5 Sup. Ct. Rep'r, 1081; *Fogg v. Blair*, 133 U. S. 534, 541; 10 Sup. Ct. Rep'r, 338.

The general grounds upon which we have proceeded are supported by *New Albany v. Burke*, 11 Wall. 96, 103, et seq. In that case, a judgment creditor of an insolvent railroad corporation sought to hold the city of New Albany liable for the balance alleged to be due by it on a subscription to the capital stock of that corporation. Under an ordinance of the city, a subscription of \$400,000, payable in city bonds, was made by it to the stock of the corporation, the railroad company agreeing that not more than \$250,000 of the bonds should be called for until the road was completed to a certain place. Pursuant to the subscription, the city delivered to the company \$200,000 of its bonds, payable to bearer. In consequence of its inability to obtain money on them, the company was unable to carry on the works, and abandoned the enterprise, after having pledged nearly all of the bonds received by it for money borrowed to prosecute it. Under those circumstances the company proposed to the city that, if it would provide means for the payment of the sums borrowed, the bonds so pledged should be returned to the city and canceled. If the bonds had been sold by the pledgees, they would not have brought

more than sufficient to pay the sums borrowed. The city accepted the proposition made to it upon the condition, to which the railroad company acceded, that the latter would cancel the city's subscription, and consent to the repeal of all ordinances relating thereto. The agreement was carried into effect, the city paying the sums for which the bonds were pledged, amounting to more than \$36,000. All the bonds, except seven that had been sold, were returned to the city and canceled, as was also the subscription of stock. One of the contentions of the judgment creditor was that this arrangement or compromise was fraudulent in law, because the capital stock of the corporation was a trust fund irrevocably pledged for the benefit of creditors, and that the corporation could not, when insolvent, give away its assets, or release its debtors without payment, or do any other act prejudicial to creditors. This court said: "There was no restriction in the contract upon the power of disposition, and none at law, or in equity, unless it be that the company could not part with the bonds in fraud of its stockholders or its creditors. And it had the right, which all other debtors had at the time, to make preferences among its creditors—to pay one rather than another. It is not to be disputed that, situated as the company was at the time when the contract of August and September, 1857, was made, with the debt of \$36,000 pressing upon it, and with no other means of relief, it might have sold the entire lot of two hundred and forty-three bonds which it held, or was entitled to call for, at the best price that could have been obtained, and might have applied the entire proceeds, had they been needed, to pay the single debt. Of this, neither the stockholders nor the other creditors could have complained. * * * Time has revealed that the bonds were worth more than they could have been sold for, but we are to look at the circumstances as they were when the transaction took place, in considering what was its nature, and whether it was legal. * * * Certainly it [the compromise] did not place the company in any worse position than it must have held had it not been made. * * *

Besides, as we have seen, the arrangement assailed by the complainants was not a modification of the subscription previously made, or a bonus given for a release. It was rather a purchase of the city debt. We think it was not beyond the power of the

contracting parties." Again, after observing that the arrangement made was binding upon the railroad company, through which, as well as against which, the judgment creditors claimed, the court said: "No doubt the subscribed capital stock of a corporation is a fund held by it in trust for its creditors, as is also all its other property, and had the railroad company released, without equivalent consideration, or given it away, its action would have been fraudulent, and might have been set aside by a court of equity. But certainly it was in the power of the directors to apply the subscription on bonds taken in payment to the extinguishment of debts, and, if thus applied in good faith, all being obtained for it that it was worth, no one has been wronged. It is, therefore, a question of fact to be determined by the evidence whether the bonds and the balance of the city's subscription were thus applied. * * * We may add the evidence is convincing that the contract between the city and the company was made in the utmost good faith, with no intention to wrong the creditors of the latter; that it was at the time considered advantageous to the company; and it is not proved that all was not paid for the bonds issued and to be issued that they could have been sold for in the market." These principles have not been modified by any decision of this court, and they fully sustain the judgment in this case. And there is some support for the judgment in *Gelpcke v. Blake*, 19 Iowa, 263, 268 (decided in 1865) in which a creditor of a railroad corporation sought to hold a stockholder liable on his subscription, notwithstanding his release by it. The court said: "Again, a release is a contract, and the articles of incorporation give to this company all the powers described in section 674 of the Code of 1851. The sixth clause of that section invests the company with power to make contracts, acquire and transfer property, possessing the same powers in such respects as private individuals now enjoy. There was no lack of power, therefore, in this company, nor do we think there would have been in the board of directors, to rescind the contract with or without the consent of the stockholders or others, when it was done in good faith, and under the peculiar and equitable circumstances of the case." The clause in the Code of 1851, above referred to, was reproduced in Revision 1860, section 1151, and in Code 1873, section 1059.

It is, however, contended that the judgment cannot be sustained without disregarding later decisions of the supreme court of Iowa, which, it is insisted, rest upon the statute of that state, and are binding upon this court. Reliance is particularly placed by the plaintiff upon *Jackson v. Traer*, 64 Iowa, 469; 20 N. W. Rep'r, 764. All the cases in that learned court to which attention has been called were determined after Greene acquired the stock in question, and all, with one exception, after this litigation was commenced. The recognition in the Iowa statute of the right of creditors of corporations to look to unpaid installments of stock subscriptions to obtain satisfaction of their demands did not confer a new right, but is recognition of a right existing before the statute, in virtue of the relations between a corporation and its creditors and stockholders. The new right given to the creditor by the statute is to have his execution, when corporate property cannot be found, levied upon the private property of the stockholder who is indebted on his subscription of stock, it being declared, out of abundant caution, that nothing in the statute "exempts" stockholders from individual liability to the amount of their unpaid installments of stock. The decisions of the state court are not, therefore, to be regarded as resting upon the local statute, but only as expressing the views of that tribunal in respect to the same principles of general law announced by this court after the fullest consideration, in the numerous cases to which we have adverted. The leading case in the state court upon this subject is *Jackson v. Traer*, above cited. It involved the liability of Greene's estate to another judgment creditor of the railroad company for the difference between the face value of his stock and the price at which it was received in payment of his claim. Upon the first hearing in the supreme court of the state, all its members except one held that the stock should be treated as fully paid. 16 N. W. Rep'r, 120. Upon a rehearing at the October term, 1884 — some time after this action was brought and had been removed into the court below — three of the judges held that Greene's estate was bound to account to creditors for eighty per cent of the face value of the stock received by him. Chief Justice Rothrock and Judge SeEVERS dissented. The two cases since *Jackson v. Traer* — we allude to *Carbon Co. v. Mills*, 78 Iowa, 460; 43 N. W. Rep'r, 290, and *Water Power Co. v. Hopkins*, 79 Iowa, 653;

44 N. W. Rep'r, 797 — do not rest upon any ground that is inconsistent with the views we have expressed.

We cannot consistently with our deliberate judgment upon this question of general law, accept the decision in *Jackson v. Traer* as controlling the determination of the present case. Upon questions of that character the federal courts administering justice in Iowa have equal and co-ordinate jurisdiction with the courts of that state, although they will lean "toward an agreement of views with the state court, if the question seems to them balanced with doubt." *Railroad Co. v. Lockwood*, 17 Wall. 357, 367; *Burgess v. Seligman*, 107 U. S. 20; 2 Sup. Ct. Rep'r, 10; *Pana v. Bowler*, 107 U. S. 429; 2 Sup. Ct. Rep'r, 704; *Hough v. Railway Co.*, 100 U. S. 213, 226; *Railroad Co. v. National Bank*, 102 U. S. 14, 30, 31; *Myrick v. Railroad Co.*, 107 U. S. 102, 109; 1 Sup. Ct. Rep'r, 425; *Carroll Co. v. Smith*, 111 U. S. 556; 4 Sup. Ct. Rep'r, 539; *Bollee v. Brimfield*, 120 U. S. 759; 7 Sup. Ct. Rep'r, 736. The judgment below, in our opinion, is in accordance with the law as it was adjudged to be when Greene received the stock in question and surrendered his claim upon the railroad company and with the law as this court has since that time frequently declared it to be; and our duty is to so declare in the case before us. Judgment affirmed.

Brown, J., not having been a member of the court when this case was argued, did not participate in its decision.*

Corporations — Liability to corporate creditors of holders of railroad stock issued as a bonus to contractors for building the road.— In view of the importance of the questions decided in the foregoing and following cases, we give here the opinion of the same court in a similar case decided at about the same time. The plaintiff Fogg had obtained a judgment against the St. Louis, Hannibal and Keokuk Railroad Company. The railroad company being insolvent, plaintiff brought suit against Blair, to hold him liable upon stock in the company which he had received under the following circumstances: Blair and Taylor entered into a contract with the company, in which they undertook to construct a portion of its road. In consideration of the work they were to receive first mortgage bonds of the company at the rate of \$12,000 for each mile of road constructed and \$850,000 par value of the stock of the company. The contract was performed and Blair and Taylor received the stock and bonds as agreed, a certificate for four thousand two hundred and fifty shares of the par value of \$425,000 being issued directly to each. It is alleged in the bill that the work done by them "was not worth more than \$12,000 per mile;"

* Reported in 11 Sup. Ct. Rep'r, 466; 120 U. S. 96.

that the first mortgage bonds delivered to them constituted "full and adequate consideration for all the work done on said part of said railroad by said Blair and Taylor under said contract;" that the issuing and delivery "of said certificates for said four thousand two hundred and fifty full-paid shares each in the capital stock of said St. Louis, Hannibal and Keokuk Railroad Company to said Blair and Taylor, as aforesaid, was without any valuable consideration paid or moving from said Blair and Taylor, or either of them, to said railroad company, and there was no consideration for said stock and the agreement on the part of said St. Louis, Hannibal and Keokuk Railroad Company;" that "the agreement on the part of the said St. Louis, Hannibal and Keokuk Railroad Company to issue and deliver to said Blair and Taylor shares in its capital stock to the amount of \$850,000, pretendingly in part payment for the completion of said part of said railroad between the south line of Pike county, Mo., near Prairieville, in said county, and Gilmore, on the Wabash, St. Louis and Pacific railroad, as aforesaid, was only colorable, and was a scheme on the part of said Blair and Taylor to get said stock without paying therefor, and it was a fraud upon your orator and other creditors of said St. Louis, Hannibal and Keokuk Railroad Company," and "the making of said contract and issue and delivery by the directors and officers of the St. Louis, Hannibal and Keokuk Railroad Company of said certificates for said four thousand two hundred and fifty shares each of full-paid stock in the capital stock to said company to said Blair and Taylor, without receiving the par value thereof either in money or work was a breach of trust, of which said Blair and Taylor had full knowledge and notice;" that "the said stock in the hands of said Blair and Taylor was and is null and void as against your orator and other creditors of said St. Louis, Hannibal and Keokuk Railroad Company;" and that by reason of the premises Blair still owes that company the sum of \$425,000 for the four thousand two hundred and fifty shares of its stock delivered to him as aforesaid.

The plaintiff prayed that the defendant might be decreed to pay the amount of his judgment against the company and also the claims of such other creditors of the company as might come in and contribute to the expense of the suit. There was a demurrer to the plaintiff's bill, which was sustained by the court below and affirmed by the supreme court. The opinion by Harlan, J., is as follows:

"It is the settled doctrine of this court, as well as of the supreme court of Missouri, that unpaid subscriptions to the stock of a corporation constitute a trust fund for the benefit of its creditors, which may not be given away or disposed of by it, without consideration or fraudulently, to the prejudice of such creditors. *New Albany v. Burke*, 11 Wall. 96, 106; *Sawyer v. Hoag*, 17 Wall. 610, 620; *Upton v. Tribilcock*, 91 U. S. 45; *Sanger v. Upton*, 91 U. S. 56; *Webster v. Upton*, 91 U. S. 65; *County of Morgan v. Allen*, 103 U. S. 498, 509; *Scovill v. Thayer*, 105 U. S. 143, 154; *Hawkins v. Glenn*, 181 U. S. 819, 835; 9 Sup. Ct. Rep'r, 789; *Richardson v. Green*, 133 U. S. 30, 45; 10 Sup. Ct. Rep'r, 280; *Peters v. Bain*, 133 U. S. 670, 691; 10 Sup. Ct. Rep'r, 354; *Clark v. Bever*, 139 U. S. 96; *Liebke v. Knapp*, 79 Mo. 22, 24. And this principle of general law is reinforced in Missouri—where the transaction in question occurred, and by whose laws the railroad corporations mentioned in the bill were created—by a statute giving a judgment creditor of a corporation, where corporate property cannot be found upon which to levy his execution, the

right to an execution against a stockholder 'to the extent of the amount of the unpaid balance of such stock by him or her owned.' 1 Rev. St. Mo. 1879, p. 121, chap. 21, § 736; 1 Rev. St. 1889, § 2517.

"While it was competent for the St. Louis, Hannibal and Keokuk Railroad Company, exercising good faith, to use its bonds and stock in payment for the construction of its road, it could not rightfully, at least as against creditors or stockholders, issue its stock to Blair and Taylor as full paid, without getting some fair or reasonable equivalent for it. What was such an equivalent depends primarily upon the actual value of the stock at the time it was contracted to be issued, and upon the compensation which, under all the circumstances, the contractors were equitably entitled to receive for the particular work undertaken or done by them. The principles which, by established law, govern the relations between a corporation and its creditors and stockholders and the management of the corporate property, would be of little value, if the corporation, by its directors, could sell or dispose of its assets to the prejudice of creditors and stockholders under such circumstances, on such terms, and at such prices as indicated, upon the face of the transaction, that they were being squandered recklessly or fraudulently in disregard of the trust committed to them. For such violations of trust the courts furnish ample remedy, independently of any statute prescribing a special mode for enforcing the liability of stockholders for the balance due upon stock held by them purporting to be, but which is not, full paid. Is the plaintiff entitled to relief, under any proper application of these principles?

"It is averred in the bill, and the demurrer admitted, for the purposes of the hearing below, that full and adequate compensation for the work done by Blair and Taylor was \$12,000 per mile in the company's first mortgage bonds. Assuming this to be true, if the stock issued to Blair and Taylor was of any considerable value at the time they received it, or if the circumstances attending its delivery to them indicated bad faith upon their part or upon the part of the corporation, different questions would arise from those now presented. But the bill contains no allegation whatever as to the real or market value of the stock. The court cannot say, from any facts set forth in the bill as to the condition of the railroads in question, that the stock when delivered to the contractors was worth par, or that it had any substantial value. If, when disposed of by the railroad company, it was without value, no wrong was done to creditors by the contract made with Blair and Taylor. If the plaintiff expected to recover in this suit upon the ground that the stock was of substantial value, it was incumbent upon him to distinctly allege facts that would enable the court—assuming such facts to be true—to say that the contract between the railroad company and the contractors was one which, in the interest of creditors, ought to be closely scrutinized. He seems to have carefully avoided making any allegation as to the real or probable value of the stock, and to have supposed that the court, in the absence of averment or proof to the contrary, would assume that it was worth par, or had substantial value. As he impugned the good faith of the transaction between the company and the contractors, it was incumbent upon him to state the essential, ultimate facts upon which his cause of action rested, and not content himself with charging, generally, that what was done was 'colorable,' a 'fraud,' a 'breach of trust,' and a

'scheme' by which Blair and Taylor were to get the stock without paying for it. These are allegations of legal conclusions merely, which a demurrer does not admit. *Dillon v. Barnard*, 21 Wall. 480, 487; *U. S. v. Ames*, 99 U. S. 35, 45; *Pullman Palace-Car Co. v. Missouri Pac. Ry. Co.*, 115 U. S. 587, 596; 6 Sup. Ct. Rep'r, 194; *Ford v. Peering*, 1 Ves. Jr. 72, 77. It is consistent with the allegations of the bill that the stock was absolutely without value when issued to Blair, and up to the time when the railroad and all the property appurtenant thereto was sold under the decree of foreclosure. The demurrer was properly sustained.

"Decree affirmed." *Fogg v. Blair*, 139 U. S. 118; 11 Sup. Ct. Rep'r, 476.

HANDLEY ET AL. V. STUTZ ET AL.

(Supreme Court of the United States, March 30, 1891.)

1. STOCK AND STOCKHOLDERS. PAROL PROOF OF ACTS AT STOCKHOLDERS' MEETING. The failure to enter in the books of a corporation, at the time it was adopted, a resolution increasing the amount of the capital stock, does not affect the validity of the increase, as such corporate acts may be proved as well by parol as by written evidence.

2. STOCKHOLDERS' MEETING IN FOREIGN STATE. VALIDITY. General Statutes of Kentucky, page 769, which require the election of directors of a domestic corporation to be held within the state, does not prevent a stockholders' meeting to increase the capital stock from being held outside of the state; and where all the stockholders are present at the meeting, and agree to the increase, and receive proportionate shares of the increased stock, they cannot question the validity of the meeting in an action brought against them by creditors of the corporation to compel them to pay the par value of the stock as a trust fund for the creditors.

3. INCREASE OF CAPITAL STOCK. IRREGULARITIES. ESTOPPEL TO DENY VALIDITY. Where the charter of the corporation empowers it to increase its capital stock to the precise amount fixed at the stockholders' meeting, subscribers to such increased stock are estopped, as against creditors of the corporation who acted without fault, believing the increase to have been lawfully made, from asserting that the increased issue of stock is invalid because the amendment of the charter authorizing such increase was never recorded or published, as required by General Statutes of Kentucky, chapter 56, sections 5, 6, section 18 of the same chapter further providing that "no persons acting as a corporation under the provisions of this act shall be permitted to set up or rely upon the want of a legal organization as a defense to an action brought against them as a corporation."

4. LIABILITY OF STOCKHOLDERS FOR NEW STOCK RECEIVED AS A GRATUITY. The stockholders of the corporation, who voted to increase the capital stock eight hundred shares, and then distributed among themselves three hundred of those shares, without any consideration, must, at the suit of creditors of the corporation, which has become insolvent, respond for the par value of the

shares, though they never expressly agreed to pay for the same, and though the stock is expressly declared to be fully paid, and free from all claims or demands on the part of the corporation.

5. **LIABILITY OF THOSE SUBSCRIBING FOR BONDS AND RECEIVING STOCK AS A BONUS.** An active corporation for the purpose of paying its debts, and obtaining money to prosecute its business, issued bonds; but, finding it impossible to negotiate them, it issued shares of capital stock in an amount equaling the par value of the bonds as an additional inducement to their purchase. Held, that persons who purchased the bonds and stock at a price fairly representing their market value, without any unfair dealing on the part of any one connected with the transaction, could not be called upon to respond for the par value of the stock, at the suit of the creditors of the corporation. Fuller, C. J., and Lamar, J., dissenting.

6. **TO WHAT CREDITORS HOLDERS OF NEW STOCK ARE LIABLE.** Creditors of a corporation are presumed to have trusted it on the faith of an increase in the capital stock from the time it was voted; and the fact that the subscribers did not receive it until after the debts were contracted will not relieve them from liability.

7. **LIABILITY OF STOCKHOLDER ACTING BY AGENT.** One of the original stockholders, who knew of the contemplated increase of the capital stock, and who authorized an agent to represent him in all matters connected therewith, cannot repudiate his agent's act in receiving a proportionate share of the increased stock distributed to him by virtue of his ownership of the original stock.

ON APPEAL from the circuit court of the United States
the middle district of Tennessee.

This was a bill in equity, filed by Sebastian Stutz, of Pittsburg, Penn.; by certain other persons composing the firm of Ragon Bros., of Evansville, Ind., and by others composing the firm of Louis Stix & Co., of Cincinnati, Ohio, on behalf of themselves and such other creditors of the Clifton Coal Company as should come in and contribute to the expenses of the suit, against the Clifton Coal Company and certain of its stockholders, to compel an assessment upon certain shares of stock held by the individual defendants, and payment of the same as a trust fund for the satisfaction of the debts of the company. The bill averred, in substance, that the Clifton Coal Company was incorporated under the laws of the state of Kentucky, in July, 1883, with power to purchase, lease and operate coal mines in the state of Kentucky, a copy of the articles of incorporation being annexed to the bill; that by said articles the capital stock of such corporation was fixed at \$120,000, divided into shares of \$100 each, with power to increase the same to \$200,000, by a majority vote of the stock-

holders; that all the stock was then taken and paid for by the subscribers in some manner agreed upon between them; that, pursuant to the authority contained in the articles of incorporation, the stockholders, all of them being present and voting, "at a meeting duly held for the purpose in May, 1886, unanimously resolved and ordered that the capital stock of said company be, and in fact it was, then increased to \$200,000, in shares of \$100 each, being an increase of eight hundred shares of stock of said company;" that of the eight hundred shares then created, the defendant Handley subscribed for eighty-six and three-fourths shares, two of the other defendants for fifteen shares each, and two others for seventy-five shares each, certificates of which were issued by the company, and delivered to and received by said subscribers, as they were respectively entitled, but that neither one of them ever paid to the company any part of the said shares, and they each, respectively, owe the said company the full par value of the shares of the said capital stock subscribed for and issued to them.

The bill also averred that on December 30, 1886, it having been previously resolved to issue bonds to the amount of \$50,000, and to secure the payment thereof by a mortgage upon its property, and said mortgage having been executed to trustees and recorded, a contract was executed and delivered to the company by certain others of the defendants, whose names were subscribed thereto, in the following terms: "We, the undersigned, subscribe for the amount set opposite our names, respectively, to bonds of the Clifton Coal Company, aggregating \$50,000. It is agreed that \$50,000 capital stock be distributed *pro rata* among the subscribers to the above bonds;" that several of the defendants subscribed to this contract, and agreed to take bonds in different amounts; that said subscribers paid the coal company for the bonds, and that with the money thus received, to the extent of \$30,000, the company paid its debts to certain of its officers and managers, who had become liable by indorsement for the company, and that nothing was or ever has been paid for or upon any of the shares of capital stock thus subscribed for, and to be distributed among them; that is to say, \$50,000 of said capital stock, equivalent to five hundred shares thereof, was in fact subscribed for and distributed among certain of the defendants, to whom, in May, 1887, there were issued and received by them, respectively, certificates for shares.

The bill further averred that the plaintiffs were judgment creditors of the company by judgments obtained in the courts of Kentucky ; that their debts were created before all of the capital stock of said company was paid in ; and that all of said \$80,000 increase of the capital stock, and each and all of the amounts due to the company for any part of its capital stock, constituted a trust fund for their benefit, which they were entitled to have administered in a court of equity to the satisfaction of their said debts, the company being insolvent.

It further appeared from the testimony that the company was organized soon after its articles of incorporation were filed ; that its chief office was at Mannington, Ky., and that it began business at once, and made large outlays and expenditures for machinery, buildings, materials and labor. In the early part of the year 1886 the company was led to believe that its coal would coke, and, therefore, its products could be profitably extended for grate and steam purposes to iron-making coke. To embark in the manufacture of coke, however, money was needed, and a meeting of the stockholders was held March 31, 1886, at which a resolution was passed, reciting that \$50,000 was needed with which to erect coke-ovens, buildings, improvements, etc., to further develop the property ; and it was unanimously resolved to issue \$50,000 of bonds of the company, in sums of \$1,000 each, due thirty years from April 1, with six per cent interest, and secured by a trust mortgage upon the property of the company, and the president was authorized to dispose of such bonds as in his discretion seemed best. The mortgage was executed to the designated trustee, and recorded. It was found, however, that the bonds could not be sold, and to meet the demands upon the company for money it borrowed a large amount upon its notes, indorsed by its directors and stockholders, and, to secure the lenders and indorsers, the \$50,000 of bonds were deposited in two banks in Nashville, Tenn., as additional collateral security for the loans. Finding that no one would purchase the bonds, and being advised that in order to effect their sale it would be better to add an equal amount of stock to the bonds, and propose to the purchasers of such bonds to give as a gratuity \$1,000 of stock with each \$1,000 bond, a meeting of the stockholders of the company was held at Nashville, May 31, 1886, at which all the stockholders were present in person or by

proxy, although without any call or previous notice, and "it was unanimously resolved that the capital stock of the company be increased to \$200,000, as authorized by the charter." This resolution was not then entered upon the records of the corporation, but was formulated in the shape of a pencil memorandum, and adopted unanimously, although no vote appeared to have been taken, and no formal record was made of the meeting until the summer of 1888. No notice of such change in the amount of its capital stock was recorded or published, as required by the laws of Kentucky. The subscribers to the bonds subsequently executed the agreement set forth in the bill, and bonds to the amount of \$45,000 were delivered to the subscribers with equal amounts of certificates of "paid-up" stock, the receipts reciting that it "was issued with bonds for same amount, as per agreement." The certificates on their face recited that the shares of stock were fully paid up, "and were non-assessable," or language to that effect. Five thousand dollars of the bonds were left in one of the national banks at Nashville as collateral security for a loan to the company, no one having subscribed for them. The remaining \$30,000 shares of increased stock, which were not needed to secure the subscribers to the bonds, appeared to have been distributed *pro rata* among the old stockholders.

In the latter part of 1887, and in the early part of the following year, plaintiffs obtained judgments against the company, which were unsatisfied, and in September, 1887, by an order of the circuit court of Hopkins county, Ky., the entire property of the company was placed in the hands of a receiver, and its operations stopped.

On February 8, 1889, this bill was filed against the coal company and the holders of this increased stock to compel payment therefor, and to recover the amounts of the judgments against the company. The court dismissed the bill as to three of the defendants not served with process, and as to the rest held them liable to all the creditors of the company whose debts originated after the alleged increase of stock, and fixed May, 1886, as the date of such increase. As to debts contracted prior to that date, they were excluded, because as between the company and the stockholders, the latter held such stock properly, and without liability to the company, and all creditors who dealt with the company

prior to such increase, and not upon the faith of such stock, had no equity to demand more than the company itself could. Five of the defendants against whom decrees were rendered in excess of \$5,000 appealed to this court, and the circuit court suspended the execution of the decree as to those who could not appeal, until this court should determine the rights of the appellants.

The opinion of the circuit court is reported in 41 Fed. Rep'r, 531.

Edwin H. East and *James S. Pilcher* for appellants. *W. Evans* for appellees.

Mr. Justice BROWN, after stating the facts as above, delivered the opinion of the court.

1. Although the resolution of May 31, 1886, increasing the stock of the company from \$120,000 to \$200,000, was not formally entered at that time upon the books of the company, and nothing but a pencil memorandum was then made of the proceedings of the meeting, no objection can be taken to its validity by reason of such omission. The testimony shows clearly what took place at this meeting. It appears from the memorandum made by Mr. Allen, the acting secretary, to have been "unanimously resolved that the capital stock of the company be increased to \$200,000, as authorized by the charter, the purposes for which said stock is issued being the betterment of the present plant, and the construction of a new plant for coking purposes." This resolution was subsequently, and in 1888, when the omission to record the same appears to have been first discovered, formally entered upon the minute-book of the corporation. The failure to enter this resolution at the time it was adopted did not affect its validity, as most corporate acts can be proved as well by parol as by written entries. *Moss v. Averell*, 10 N. Y. 449.

2. Nor were the proceedings of such meeting any less binding upon those participating in it by reason of the fact that it was held without call or notice, and outside the boundaries of the state under the laws of which the company was incorporated. By an act of the legislature of Kentucky of March 3, 1876 (Gen. St., p. 769), "all elections for directors and other officers, by private corporations," etc., "shall be held within the territorial limits of the state of Kentucky. * * * Any such election held

outside of Kentucky shall be void." Beyond the election of officers, however, there is no statutory restriction of corporate action to the limits of the state, and, in the absence of such inhibition, the proceedings of such meeting would, within the rule laid down by this court in *Railroad Co. v. Cowdrey*, 11 Wall. 459, with regard to directors' meetings, be binding upon all those participating in it, as well as upon those acting upon the faith of its validity, or receiving stock authorized to be issued at such meeting. It is true there are cases holding that stockholders' meetings cannot be legally held outside of the home state of the corporation, but the question has generally arisen where a majority present at such meeting had attempted by their action to bind a dissenting minority, or had taken action prejudicial to the rights of third persons. *Ormsby v. Mining Co.*, 56 N. Y. 623; *Hilles v. Parrish*, 14 N. J. Eq. 380. Indeed, so far as we know, the authorities are uniform to the effect that the action taken at such meetings is binding upon those who participate in or take the benefit of them. *Heath v. Mining Co.*, 39 Wis. 146. In this case the meeting was attended by all the stockholders but two, who were represented by proxy; the vote increasing the stock was unanimous, and it does not lie in the mouth of those who participated in this act or received the stock voted at this meeting to question its validity.

3. It is further claimed that this issue of stock was invalid by reason of the fact that there was no amendment of the charter authorizing such increase ever recorded or published, as required by the law of Kentucky. The proceeding for the organization of incorporated companies is found in chapter 56 of the General Statutes of Kentucky, the fifth section of which requires a notice to be published for at least four weeks in some newspaper as convenient as practicable to the principal place of business, specifying several particulars, among which is the amount of capital stock authorized, and the times when, and the conditions upon which, it is to be paid in. Section 6 is as follows: "The corporation may commence business as soon as the articles are filed for record in the office of the county court clerk, and their acts shall be valid if the publication in a newspaper is made and the copy filed in the office of the secretary of state, when such filing is necessary, within three months from such filing in the clerk's

office. No change in any of the foregoing particulars shall be valid unless recorded and published as the original articles are required to be ; nor shall any change be made at any time or in any manner which would be inconsistent with the provisions of this act." Reliance is placed upon the final clause of this section for the position assumed by the defendants, that the increase in the capital stock, never having been recorded or published, as required by this clause, was void, and the case of *Scovill v. Thayer*, 105 U. S. 143, is cited in support of this contention. That was also an action to recover unpaid assessments upon stock. The statutes of Kansas provided that any corporation might increase its capital stock to any amount not exceeding double the amount of its authorized capital. The corporation in question had increased its capital stock, as it was authorized to do by doubling it, and it subsequently increased it by doubling it again, thus quadrupling the original amount, the defendant in the case having attended by proxy the meeting at which such illegal increase was voted, and received a quantity of the stock thus issued. It was held that such increase was *ultra vires*, and void, and that the defendant was not estopped from denying the validity of the over-issue, or his obligation to pay for it.

In the case under consideration, however, the articles of incorporation did provide that the capital stock should be \$120,000, with power to increase to \$200,000 by a majority vote of the stockholders, and there was no statutory inhibition, as in Kansas, against any such increase as it might be thought advisable to make. Here, then, was the power to increase the capital stock to the precise amount fixed by the stockholders at their meeting, at Nashville, and the defect was merely in the failure to record and publish such change, as required by section 6 of the statute in question.

It is insisted by the appellees, and the learned judge of the circuit court so held, that the failure to record and publish this increase of the capital stock, which was in fact, if not in name, an amendment to the original articles, which had fixed the capital stock at \$120,000, was a mere irregularity and informality in the proceedings to effect the increase ; such a one, as was said by this court, in *Chubb v. Upton*, 95 U. S. 665, 667, to constitute no defense to a subscriber to such increased stock. In that case it

appeared only that objection was made to the proceedings by which the company increased its stock, on the ground of irregularity and informality in the papers filed in the public offices; and it was held that one who contracted with an acting corporation by purchasing stock in the same could not defend himself against a claim upon such contract, in a suit by the corporation, by urging the illegality of its organization. In *Veeder v. Mudgett*, 95 N. Y. 295, which was also an action by directors against stockholders of a corporation to enforce the liability imposed upon them because of an alleged failure to pay in the full amount of the capital stock, it appeared that the meeting at which the increased stock was voted was not formally called, nor was a certificate of the increase of capital made and filed as prescribed by the state statute. The stock was, however, all issued to stockholders who voted for the increase. These holders subsequently received dividends thereon, voted at stockholders' meetings, and in all respects were treated and acted as stockholders. The court held the attempted increase irregular, but that the defendant stockholders, as against the creditors of the company, by accepting their proportions of the increased stock, by voting for its increase, by taking dividends upon it, and by holding it out to those dealing with the company as an actual component of its capital, were estopped from denying the validity of the increase. It was argued in that case, as it is in this, that an act absolutely and wholly void, because incapable of being performed, could not be made valid by estoppel; but this was held to be true only where there was an entire lack of power to do the act so brought in question, and the case of *Scovill v. Thayer* was cited. "But where," says the court, "as in the present case the abstract power did exist, and there was a way in which the increase could lawfully be made, and the creditors acted without fault, believing that the increase had been lawfully effected, and the necessary steps had been taken, there the doctrine of estoppel may apply, and the increased stock be deemed valid as against the creditors who have acted upon the faith of such increase."

It is true that in neither of those cases was the court embarrassed by a statute declaring that certain conditions must be observed or the increase would not be valid. But we think that the clause of section 6, upon which reliance is placed, must be

read in connection with section 18 of the same act, which provides that "no persons acting as a corporation under the provisions of this act shall be permitted to set up or rely upon the want of a legal organization as a defense to an action brought against them as a corporation; nor shall any person who may be sued on a contract made with such corporation, or sued for an injury done to its property, or for a wrong done to its interests, be permitted to rely upon such want of legal organization in his defense." It is true that this section seems to apply rather to a want of an original legal organization of the company; but we think it should be regarded as applying as well to amendments to such organization, and that no defense connected with the original organization which a party contracting with the corporation would be disqualified to set up, can be made available in connection with an amendment to the original articles.

So far as the question of liability to the proposed assessments is concerned, these defendants, with respect to their relations to this corporation, are divisible into two distinct classes: First, those of the original stockholders who received the \$30,000 increased stock as a gift; second, those who subscribed to the \$50,000 bonds, and received an equal amount of stock as a bonus or inducement to make the subscription.

4. With regard to the first class, namely, the original stockholders, who voted for this increase of eight hundred shares, and then distributed among themselves three hundred of those shares without the shadow of right or consideration, it is difficult to see why they should not be called upon to respond for their value. The only claim made upon their behalf is that they never agreed to contribute or pay for the same; that the stock was expressly declared to be "fully paid" and "free from all claims or demands upon the part of the company;" that there was no evidence that the creditors of the company knew of or relied upon this increase in their dealings with the company; and that they had a right to return and surrender the same, which they offered to do. There is no reason to suppose that these stockholders did not act in good faith, and in the belief that they were entitled to this stock. The fact that they did not subscribe for it or agree to take it until the receipt of the certificates is immaterial, as the acceptance of the certificates is sufficient evidence of an agreement to pay their par

value. *Sanger v. Upton*, 91 U. S. 56, 64; *Chubb v. Upton*, 95 U. S. 665; *Brigham v. Mead*, 10 Allen, 245.

Ever since the case of *Sawyer v. Hoag*, 17 Wall. 610, it has been the settled doctrine of this court that the capital stock of an insolvent corporation is a trust fund for the payment of its debts; that the law implies a promise by the original subscribers of stock, who did not pay for it in money or other property, to pay for the same when called upon by creditors; and that a contract between themselves and a corporation that the stock shall be treated as fully paid and non-assessable, or otherwise limiting their liability therefor, is void as against creditors. The decisions of this court upon this subject have been frequent and uniform, and no relaxation of the general principle has been admitted. *Upton v. Tribilcock*, 91 U. S. 45; *Sanger v. Upton*, 91 U. S. 56; *Webster v. Upton*, 91 U. S. 65; *Chubb v. Upton*, 95 U. S. 665; *Pullman v. Upton*, 96 U. S. 328; *County of Morgan v. Allen*, 103 U. S. 498; *Hawkins v. Glenn*, 131 U. S. 319; 9 Sup. Ct. Rep'r, 739; *Graham v. Railroad Co.*, 102 U. S. 148, 161; *Richardson's Ex'rs v. Green*, 133 U. S. 30; 10 Sup. Ct. Rep'r, 280.

It is simply in affirmance of this general principle that section 14, chapter 56, of the General Statutes of Kentucky declares that nothing in the act conferring corporate franchises, or permitting the organization of corporations, "shall exempt the stockholders of any corporation from individual liability to the amount of the unpaid installments on stock owned by them." If the corporation has no right as against creditors to sell or dispose of this stock with an agreement that no further assessment shall be made upon it, much less has it the right to give it away, or distribute it among shareholders, without receiving a fair equivalent therefor, and thereby induce the public to deal with it upon the credit of such shares, as representing the assets of the corporation. *Union Mut. Life Ins. Co. v. Frear Stone Man'g Co.*, 97 Ill. 537. The stock of a corporation is supposed to stand in the place of actual property of substantial value, and as being a convenient method of representing the interest of each stockholder in such property, and to the extent to which it fails to represent such value it is either a deception and fraud upon the public, or an evidence that the original value of the corporate property has become depreciated. The market value of such shares rises with an increase in

the value of the corporate assets, and falls in case of loss or misfortune, whereby the value of such assets is impaired; and the increase of value of such stock is taken to represent either an appreciation in value of the company's property beyond the par value of the original shares, or so much money paid to the corporation as is represented by such shares. If it be once admitted that a corporation may issue stock without receiving a consideration therefor, and where it does not represent actual or substituted value in corporate assets, there is apparently no limit to the extent to which the original stock may be "watered," except the caprice of the stockholders. While an agreement that the subscribers or holders of stock shall never be called upon to pay for the same may be good as against the corporation itself, it has been uniformly held by this court not to be binding upon its creditors.

5. Somewhat different considerations apply to those who subscribed for the bonds of the company with the understanding that they were to receive an amount of stock equal to the bonds as an additional inducement to their subscription. The facts connected with this transaction are substantially as follows: Some three years after the company was organized it became apparent that the enterprise, as originally contemplated, namely, the mining and selling of coal for steam and domestic purposes, was not likely to be a success owing to the inferior character of the product; and the only hope of the company lay in the manufacture of the coal into an iron-making coke, that is, a coke containing a percentage of sulphur low enough to admit of the manufacture of merchantable pig-iron. To embark in this, however, money was needed, and, as the stock of the company was not worth more than fifty cents on the dollar, it was evident this could not be effected simply by the issue of new stock. It was proposed at the meeting in March that money should be raised by the issue of \$50,000 of bonds, with which to add the requisite structures to the plant. But it was soon evident that the bonds could not be negotiated without the stock, and, acting upon the suggestion of a Nashville banker, it was resolved at the meeting in May that the stock should be increased eight hundred shares, five hundred of which should be turned over to the subscribers to the bonds as a bonus or an additional consideration. The evidence is uncontradicted that the bonds could not have been negotiated without the stock,

that they were both sold as a whole ; that the transaction was in good faith ; and, considering the risk that was taken by the subscribers, the price paid for the stock and bonds was fair and reasonable. The directors appear to have done all in their power to obtain the best possible terms, and there is no imputation of unfair dealing on the part of any one connected with the transaction. At that time the mines and property of the company were in good condition, and the prospects of success were fair.

The case, then, resolves itself into the question whether an active corporation, or, as it is called in some cases, a "going concern," finding its original capital impaired by loss or misfortune, may not, for the purpose of recuperating itself and providing new conditions for the successful prosecution of its business, issue new stock, put it upon the market, and sell it for the best price that can be obtained. The question has never been directly raised before in this court, and we are not, consequently, embarrassed by any previous decisions on the point. In the *Upton* cases, arising out of the failure of the Great Western Insurance Company, in *Hatch v. Dana*, 101 U. S. 205, and in *Hawkins v. Glenn*, 131 U. S. 319; 9 Sup. Ct. Rep'r, 739, the defendants were either original subscribers to the increased stock, at a price far below its par value, or transferees of such subscribers; and the stock was issued, not, as in this case, to purchase property or raise money to add to the plant, and facilitate the operations of the company, but simply to increase its original stock in order to carry on a larger business, and the stock thus issued was treated as if it formed a part of the original capital. In *County of Morgan v. Allen*, 103 U. S. 498, the same principle was applied to a subscription by a county to the capital stock of a railroad company, for which it had issued its bonds, although such bonds had been surrendered to the county with the consent of certain of its creditors.

To say that a corporation may not, under the circumstances above indicated, put its stock upon the market, and sell it to the highest bidder, is practically to declare that a corporation can never increase its capital by a sale of shares, if the original stock has fallen below par. The wholesome doctrine, so many times enforced by this court, that the capital stock of an insolvent corporation is a trust fund for the payment of its debts, rests upon

the idea that the creditors have a right to rely upon the fact that the subscribers to such stock have put into the treasury of the corporation, in some form, the amount represented by it; but it does not follow that every creditor has a right to trace each share of stock issued by such corporation, and inquire whether its holder, or the person of whom he purchased, has paid its par value for it. It frequently happens that corporations, as well as individuals, find it necessary to increase their capital in order to raise money to prosecute their business successfully, and one of the most frequent methods resorted to is that of issuing new shares of stock and putting them upon the market for the best price that can be obtained; and, so long as the transaction is *bona fide*, and not a mere cover for "watering" the stock, and the consideration obtained represents the actual value of such stock, the courts have shown no disposition to disturb it. Of course no one would take stock so issued at a greater price than the original stock could be purchased for, and hence the ability to negotiate the stock and to raise the money must depend upon the fact whether the purchaser shall or shall not be called upon to respond for its par value. While, as before observed, the precise question has never been raised in this court, there are numerous decisions to the effect that the general rule that holders of stock, in favor of creditors, must respond for its par value, is subject to exceptions where the transaction is not a mere cover for an illegal increase. Thus in *New Albany v. Burke*, 11 Wall. 96, a city subscribed to the stock of a railroad, and issued bonds for a part of the subscription, agreeing to issue them for the rest of it, when the road should be built to a certain point. The road relied mainly upon these bonds to raise the necessary money. The validity of the bonds being denied by tax-payers who had filed bills to enjoin the raising of a tax to pay the interest, their value in the market was largely impaired, and it was found they could not be sold without a sacrifice. Under these circumstances the company applied to the city to pay a certain sum which had been borrowed by the road upon the pledge of the bonds already issued, with sundry other moneys, and in consideration thereof the city obtained from the company a large number of bonds which had not been negotiated, and a cancellation of the subscription. In a suit brought by a judgment creditor to enforce the original subscription, it was

held that the compromise was legal, and the payment of such subscription would not be enforced, although it subsequently turned out that the bonds were worth more than they could have been sold for. Said Mr. Justice Strong, speaking for the court: "Had the company sold to a stranger, and then the city become a purchaser from the stranger, it will not be contended that any creditor of the company could complain. And it can make no difference whether the purchase was made directly or indirectly from the first holder of the bonds, assuming that there was no fraud. The transaction * * * was in substance plainly nothing more than a purchase by the city of its own bonds, some of which had been issued, and others of which it was under obligation to issue, at the call of the vendor. * * * Looking at it in the light of subsequent events, it was no doubt an advantageous purchase for the city; and if the uncontradicted evidence is to be believed, it was deemed at the time an advantageous sale or arrangement for the company. * * * We may add, the evidence is convincing that the contract between the city and the company was made in the utmost good faith, with no intention to wrong creditors of the latter; that it was at the time considered advantageous to the company; and it is not proved that all was not paid for the bonds issued and to be issued that they could have been sold for in the market."

So in *Coit v. Amalgamating Co.*, 119 U. S. 343; 7 Sup. Ct. Rep'r, 231, it was held that where the charter of a corporation authorized the capital stock to be paid for in property, and the shareholders honestly and in good faith pay for their subscriptions in property instead of money, third parties have no ground of complaint, although a gross and obvious over-valuation of such property would be strong evidence of fraud in an action by a creditor to enforce personal liability. The court held that where full-paid stock was issued for property received, there must be actual fraud in the transaction to enable creditors of the corporation to call the stockholders to account. In delivering the judgment of the court in that case at the circuit (14 Fed. Rep'r, 12), Mr. Justice Bradley observed: "That trust [in favor of creditors] does not arise absolutely in every case where capital stock has been issued, and where it has been settled for by arrangement with the company. It is not as if the stockholders had given their prom-

issory notes for the amount, these notes being in the treasury of the company; but there are often equities to which the stockholders are entitled — on which they are to stand." As one of them he mentioned the case of stock dividends fairly made in consideration of profits earned, and of accumulations of the property of the company, and observed: "It is not true that it is in the power of a creditor in every case and in all cases, as a mere matter of right, to institute an inquiry as to the valuation of the amount of the consideration given for the stock, and disturb fair arrangements for its payment in other ways than by cash. If the stock has been fairly created and paid for, there is an end of trusts in favor of anybody; and this does not affect the general proposition that unpaid subscriptions of stock are a trust fund to be administered for the benefit of creditors after a corporation becomes insolvent."

A case nearer in point is that of *Clark v. Bever* (decided at the present term of this court). In this case, a railroad company, of which defendant's intestate was president and stockholder, had a settlement with a construction company, of which defendant's intestate was also a member, for work done in building the road. The railroad company, being unable to pay the claim of the construction company, delivered to it three thousand five hundred shares of its stock at twenty cents on the dollar, and the same were accepted in full satisfaction of the debt. The stock was not worth any thing in the market, and was issued directly to the defendant's intestate. No other payment than the twenty per cent was ever made on account of this stock.

A judgment creditor of the railroad company filed a bill to compel the payment by the defendant of his claim, upon the theory that he was liable for the actual par value of such stock, whatever may have been its market value at the time it was received. It was held he could not recover. "Of course, under this view," says Mr. Justice Harlan, in delivering the opinion of the court, "every one having claims against the railway company — even laborers and employes — who could get nothing except stock in payment of their demands, became bound, by accepting stock at its market value in payment, to account to unsatisfied judgment creditors for its full face value, although at the time it was sought to make them liable the corporation had ceased to exist, and its

stock had remained, as it was when taken, absolutely worthless.
* * * To say that a public corporation, charged with public duties, may not relieve itself from embarrassment by paying its debt in stock at its real value, there being no statute forbidding such a transaction, without subjecting the creditor, surrendering his debt, to the liability attaching to stockholders who have agreed, expressly or impliedly, to pay the face value of stock subscribed by them, is, in effect, to compel them either to suspend operations the moment they become unable to pay their current debts, or to borrow money secured by mortgage upon the corporate property."

So, in *Fogg v. Blair*, also decided at the present term, it was held to be competent for a railroad exercising good faith to use its bonds or stock in payment for the construction of its road, although it could not, as against creditors or stockholders, issue its stock as fully paid without getting some fair or reasonable equivalent for it. It was there said: "What was such an equivalent depends primarily upon the actual value of the stock at the time it was contracted to be issued, and upon the compensation which, under all the circumstances, the contractors were equitably entitled to receive for the particular work undertaken or done by them." It appeared in that case that full and adequate compensation for the work done had been paid by the company in its mortgage bonds, and, as the bill contained no allegation whatever as to the real market value of such stock, it was held that the contractors receiving this stock were not liable to creditors for its par value. It was added: "If, when disposed of by the railroad company, it was without value, no wrong was done to creditors by the contract made with Blair and Taylor. If the plaintiff expected to recover in this suit on the ground that the stock was of substantial value, it was incumbent upon him to distinctly allege facts that would enable the court, assuming such facts to be true, to say that the contract between the railroad company and the contractors was one which, in the interest of creditors, ought to be closely scrutinized." It would seem to follow from this that, if the stock had been of some value, that value, however much less than par, would have been the limit of the holder's liability.

In *Morrow v. Steel Co.*, 87 Tenn. 262; 10 S. W. Rep'r, 495, the supreme court of Tennessee held that a contract with a sub-

scriber to stock of a corporation, that for every share subscribed he should receive bonds to an equal amount, secured by mortgage on the company's plant, is void as against creditors, and also between the subscriber and the corporation. But the court drew a distinction between such a case and sales of or subscription to the stock of an organized and going corporation. It said: "The necessities of the business of an organized company might demand an increase of capital stock, and, if such stock is lawfully issued, it may very well be offered upon special terms. In such case, if the market-price was less than par, it is clear that a purchaser or subscriber for such stock at its market value would, in the absence of fraud, be liable only for his contract-price. So a case might arise where the stock of a going concern was much depreciated, and where its bonds were likewise below par, and there was lawful authority to issue additional stock and bonds. Now, in such case, the real market value of an equal amount of stock and bonds might not exceed, or even equal, the par value of either. In such cases the question of fraud aside, the purchaser would only be held for his contract-price." This case from Tennessee puts as an illustration the exact case with which we are now dealing.

The liability of a subscriber for the par value of increased stock taken by him may depend somewhat upon the circumstances under which, and the purposes for which, such increase was made. If it be merely for the purpose of adding to the original capital stock of the corporation, and enabling it to do a larger and more profitable business, such subscriber would stand practically upon the same basis as a subscriber to the original capital. But we think that an active corporation may, for the purpose of paying its debts, and obtaining money for the successful prosecution of its business, issue its stock, and dispose of it for the best price that can be obtained. *Stein v. Howard*, 65 Cal. 616; 4 Pac. Rep'r, 662. As the company in this case found it impossible to negotiate its bonds at par without the stock, and as the stock was issued for the purpose of enhancing the value of the bonds, and was taken by the subscribers to the bonds at a price fairly representing the value of both stock and bonds, we think the transaction should be sustained, and that the defendants cannot be called upon to respond for the par value of such stock,

as if they had subscribed to the original stock of the company. Our conclusion upon this branch of the case disposes of it as to those who were held liable by virtue of their subscription to the bonds.

6. We have no doubt the learned circuit judge held correctly that it was only subsequent creditors who were entitled to enforce their claims against these stockholders, since it is only they who could, by any legal presumption, have trusted the company upon the faith of the increased stock. *First Nat. Bank v. Gustin Minnesota Consolidated Min. Co.* (Minn.), 44 N. W. Rep'r, 198; 2 *Mor. Priv. Corp.*, §§ 832, 833; *Coit v. Amalgamating Co.*, 14 *Fed. Rep'r*, 12. We also agree with him that creditors who became such after the increase was voted in May, 1886, are entitled to look to those who subsequently received the stock, notwithstanding they did not receive it until after the debts had been contracted. The circuit judge found in this connection that the "complainants had no knowledge or notice of the subscription paper of December 30, 1886, under which \$45,000 of the new stock was distributed to those who subscribed for bonds, nor of the distribution among the old stockholders of \$30,000 of said increased stock, nor does it affirmatively appear that they, or either of them, dealt with and trusted the company upon the faith of that increased stock; but the fact that the capital stock had been increased to \$200,000 was made public, and was generally known."

The real question in this connection is, when may it be presumed creditors trusted the corporation upon the faith of the increased stock? Obviously when such increase was ordered. That is a fact to which publicity would naturally be given. The creditors could not be expected to know when and by whom such stock would be taken. It is true, they assume the risk of the stock not being taken at all, but the moment shares are taken they are supposed to represent so much money put into the treasury as they are worth, which becomes available for the payment not only of future, but of existing, creditors. It is manifest that any attempt to gauge the liability of stockholders by the exact time they took their stock with reference to the dates when the several claims of the creditors accrued, and by the further fact whether the creditors actually knew of and relied upon such stock, would, in a case like this, where the creditors and stock-

holders are both numerous, lead to inextricable confusion. Even the flexibility of a court of equity would be inadequate to adjust the rights of the parties.

7. With regard to the special defense set up by Neely, that he never consented to nor received certificates for increased stock, we agree with the circuit judge that it is not sustained. He did not live in Nashville, but had given a proxy to one Sandford to represent him at stockholders' meetings. He knew of the arrangement to issue an amount of the stock equal to the bonds, and to distribute \$30,000 of the increased stock, ordered by the resolution of May, 1886; and on April 5, 1887, he gave a power of attorney to Sandford, authorizing the latter, for him, and in his name and stead, to "receipt to the Clifton Coal Company for stock in my name, and transfer, bargain and sell the same as if I were there present." Under this power of attorney, Sandford surrendered Neely's certificate for three hundred shares, and receipted for three hundred and seventy-five shares, the certificates for which were delivered to him as agent of Neely, and which Sandford subsequently voted at stockholders' meetings, under the general proxy from Neely to represent his stock. Knowing of the contemplated action in issuing the new stock, and having authorized Sandford to represent him in all matters connected therewith, we think it too late for him to repudiate Sandford's act in receiving the additional seventy-five shares, which were distributed to him as the owner of three hundred original shares. Indeed, the circuit judge finds it to be established by the proof that all of the old stockholders knew of and acquiesced in the disposition of the new stock as made; and that such increased stock was represented and voted at subsequent meetings of stockholders, and was recognized and held out to the public as part of the capital stock of the company. Under the case of *Sawyer v. Hoag*, 17 Wall. 610, Neely was clearly not entitled to set off against the claim of the creditors his own claim against the corporation. *Cook Stocks*, §§ 193, 194.

There are several minor points made in the briefs of counsel with regard to the claims of certain creditors, which we do not find it necessary to discuss at length. We think there was no error in the rulings of the court in these particulars.

It results that the decree of the court below must be reversed,

and the cause remanded for further proceedings in conformity with this opinion.

FULLER, C. J. (dissenting). I dissent from the conclusion of the court in respect of the stock received by the subscribers to the bonds. That stock was not paid for in money or money's worth, or issued in payment of debts due from the company, or purchased at sale upon the market. It was a mere bonus, thrown in with the bonds as furnishing the inducement to the bond subscription, of larger control over the corporation, and of possible gain without expenditure. Becoming secured creditors through the bonds, the subscribers increased their power through the stock. In my view there was no actual payment for the stock, and to treat it as paid up is to sanction an arrangement to relieve those who would reap the benefit derived from the possession of the stock in the event of the success from liability for the consequences in the event of the failure of the enterprise. When the capital stock of a corporation has become impaired, or the business in which it has engaged has proven so unremunerative as to call for a change, creditors at large may well demand that experiments at rehabilitation should not be conducted at their risk. My Brother Lamar concurs with me in this dissent.*

UNPAID SUBSCRIPTIONS TO STOCK AS A TRUST FUND FOR CREDITORS.

1. The doctrine as declared by the courts.—That unpaid subscriptions to the capital stock of a corporation, are regarded in equity, as a trust fund for the benefit of the creditors of the corporation, is a doctrine which has now become firmly established in American jurisprudence. The following cases directly declare or apply this doctrine, and many others tacitly assume its existence. *Allen v. Montgomery B. Co.*, 11 Ala. 437 (1847); *Goodwin v. McGehee*, 15 Ala. 232 (1849); *Glenn v. Semple*, 80 Ala. 159 (1885); *Ward v. Griswoldville Mfg. Co.*, 16 Conn. 593 (1844); *Hightower v. Thornton*, 8 Ga. 486 (1850); *Schley v. Dixon*, 24 Ga. 273 (1858); *Coffin v. Ransdell*, 110 Ind. 417; *Osgood v. King*, 42 Iowa 478 (1876); *Jackson v. Trow*, 64 Iowa, 469 (1884); *Union Ins. Co. v. Freer Stone Mfg. Co.*, 97 Ill. 587; *Scovill v. Thayer*, 105 Ill. 143 (1881); *Bouton v. Dement*, 123 Ill. 142 (1887); *Winston v. Dorsett Pipe & Paving Co.*, 129 Ill. 64 (1889); *Walburn v. Chenault*, 43 Kans. 352; *Rider v. Morrison*, 54 Md. 429; *Crawford v. Rohrer*, 59 Md. 599; *First National Bank v. Hingham Mfg. Co.*, 127 Mass. 563; *Young v. Erie Iron Co.*, 65 Mich. 111; *Farnsworth v. Robbins*, 36 Minn. 369; *Lewis v. Robertson*, 13 S. & M. 553 (1850); *Vick v. LaRochelle*, 57 Miss. 602; *Fisher v. Seligman*, 7 Mo. App. 883; *Choctau v. Dean*, 7 Mo. App. 210; *Kehlor v. Lademan*, 11 Mo. App. 550; *Erskine*

* Reported in 11 Sup. Ct. Rep'r, 530; 139 U. S. 417.

v. Peck, 18 Mo. App. 290; Shickle v. Watts, 94 Mo. 410; Thompson v. Lake, 19 Nev. 108; Wetherbee v. Baker, 85 N. J. Eq. 501; Slee v. Bloom, 19 Johns. 456 (1822); Morgan v. New York, etc., R. Co., 10 Paige, 290 (1843); Sagory v. Dubois, 8 Sandf. Ch. 466 (1846); Marshall Foundry Co. v. Killian, 99 N. C. 501; Mier v. Zanesville, etc., Turnpike Co., 11 Ohio, 273; S. C., 18 Ohio, 197; Henry v. Vermillion, etc., R. Co., 19 Ohio, 187; Germantown Passenger R. Co. v. Felter, 60 Penn. St. 124; Lane's Appeal, 105 Penn. St. 49; Bell's Appeal, 115 Penn. St. 88; Bassett v. St. Albans Hotel Co., 47 Vt. 818; Adler v. Milwaukee, etc., Mfg. Co., 18 Wis. 57 (1860); Ogilvie v. Knox Ins. Co., 23 How. 880 (1859); Sawyer v. Hoag, 17 Wall. 610 (1873); Upton v. Tribilcock, 91 U. S. 45; Sanger v. Upton, 91 U. S. 56; Webster v. Upton, 91 U. S. 65; Scammon v. Kimball, 92 U. S. 362; Chubb v. Upton, 95 U. S. 665; County of Morgan v. Allen, 108 U. S. 498; Upton v. Hansbrough, 3 Biss. 417; Upton v. Burnham, 3 Biss. 520; Payson v. Stoever, 2 Dill 427; 2 Mor. Corp., §§ 780, 781, 830; Cook Stock & Stockh., § 199; 1 Beach Corp., § 116.

This doctrine, in its general intent, is but a corollary of the earlier and more general doctrine that the capital stock of a corporation, represented by the corporate property and assets, is a trust fund for the satisfaction of its debts. Ward v. Dummer, 3 Mason, 308 (1824); Crandall v. Lincoln, 52 Conn. 73; Munna v. Potomac Co., 8 Pet. 281 (1834); Curran v. State of Arkansas, 15 How. 304 (1853); 1 Beach Priv. Corp., §§ 116, 117. Unpaid subscriptions are but a part of the capital stock of the corporation, and any rule which applies to the entire capital would necessarily apply to each part composing it.

It follows as a matter of course, from the statement of the doctrine, that equity will compel payment of any thing due on subscriptions for stock for the benefit of creditors of the corporation. See cases already cited, and particularly, Glenn v. Semple, 80 Ala. 159; Ward v. Griswoldville Mfg. Co., 16 Conn. 593; Hightower v. Thornton, 8 Ga. 486; Schley v. Dixon, 24 Ga. 273; First National Bank v. Hingham Mfg. Co., 127 Mass. 568; Lewis v. Robertson, 18 S. & M. 558; Morgan v. New York, etc., R. Co., 10 Paige, 290; Sagory v. Dubois, 8 Sandf. Ch. 466; Germantown Pass. R. Co. v. Filter, 60 Penn. St. 124; Bassett v. St. Albans Hotel Co., 47 Vt. 818; Adler v. Milwaukee, etc., Mfg. Co., 18 Wis. 57; Ogilvie v. Knox Ins. Co., 23 How. 880; Scammon v. Kimball, 92 U. S. 362; Hatch v. Dana, 101 U. S. 205; Hawley v. Upton, 102 U. S. 314; Payson v. Stoever, 2 Dill 427.

Many other conclusions also follow from the principal doctrine with reference to dealings by the corporation and stockholder, touching the subject-matter of the trust, viz.: the unpaid balance of the subscription, which will be considered hereafter.

The *rationale* of the doctrine as it has grown up and shaped itself may be shown by a few quotations from the leading decisions on the subject. In Allen v. Montgomery R. Co., 11 Ala. 487 (1847), the court says: "Has then a court of equity the authority to reach subscriptions for stock to satisfy a creditor when there is a deficiency of legal assets, in the absence of any call by the corporation upon its stockholders? That it has, is, we think, a clear position as well in reason as authority. As the individual corporators are not themselves personally responsible for the contracts of the corporation, there is no responsibility anywhere, if the capital stock is not a fund answerable to the

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a shareholder in a corporation, and every person who deals with a corporation, understands that the fund contributed or agreed to be contributed as the company's capital shall be charged with the payment of corporate debts. It is likewise understood, when there is no express provision to the contrary, that the fund so charged shall be the only security of creditors, and that the shareholders shall not be individually liable for the corporate debts and obligations. Every contract entered into by a corporation, therefore, includes —

"1. An implied agreement that the company's capital shall be held and used as a trust fund equitably pledged as security for the corporate debts.

"2. An implied representation that the company's capital has been paid in or subscribed as indicated by the company's charter, and that the fund contributed or subscribed has been preserved for the purposes for which it was provided.

"The obligations so assumed by a corporation are nominally those of the corporate entity, not of its shareholders; but it is plain that the shareholders are the real parties in interest; and this fact will be judicially recognized by compelling the shareholders to make good the security which parties dealing with the corporation are justly entitled to expect." 2 Mor. Corp., § 781.

And again: "In equity, however, a corporation is recognized as an association of individuals united for their common benefit, under a collective name, and the rights of creditors are adjusted accordingly. The fund contributed or agreed to be contributed by shareholders, as capital for the purpose of carrying on the company's business and securing its creditors, is considered as a substitute for the general liability of the shareholders for obligations incurred in a corporate capacity. The fund so contributed or agreed to be contributed is treated in equity as a trust fund charged with the payment of the corporate debts. This charge or equitable lien in favor of creditors adheres to the capital of a corporation after the company has been dissolved and deprived of its franchises; and although the legal remedies of creditors are lost under these circumstances, their right to have the benefit of the fund which the shareholders have contributed or become liable to contribute for their security will be protected." 2 Mor. Corp., § 780. See, also, Cook Stock & Stockh., § 199; 1 Beach Priv. Corp., § 116.

2. Arrangements between the corporation and the stockholder after the subscription has become binding, to discharge the stockholder upon payment of less than par. — A person may become obligated to pay to the corporation the par value of stock, not only by signing a written agreement to subscribe and pay for the stock, but also by agreeing to take stock or by accepting stock issued or allotted to him. *Spear v. Crawford*, 14 Wend. 20; *Hartford & N. H. R. Co. v. Kennedy*, 12 Conn. 499; *Rensselaer & N. W. Plank R. Co. v. Barton*, 16 N. Y. 457; *Small v. Herkimer Mfg. Co.*, 2 N. Y. 380; *Dayton v. Borst*, 31 N. Y. 485; *Hartford & N. H. R. Co. v. Croswell*, 5 Hill, 383; *Nulton v. Clayton*, 54 Iowa, 425; *Jackson v. Fraer*, 64 Iowa, 469; *Chisholm v. Forney*, 65 Iowa, 833; *Upton v. Tribilcock*, 91 U. S. 45; *Webster v. Upton*, 91 U. S. 65; *Chubb v. Upton*, 95 U. S. 665; 2 Beach Priv. Corp., § 559.

In other words, there need not be an *express* promise to pay for stock. The law *implies* a promise to pay for stock which one has accepted or agreed to take. When the obligation to pay for stock has once become binding, it cannot be discharged, as to creditors, except in some mode authorized by statute,

or by payment in full. Any arrangement between the stockholder and the corporation by which he is to be discharged from his obligation by payment of less than par is voidable as to creditors. *Allen v. Montgomery R. Co.*, 11 Ala. 437; *Goodwin v. McGehee*, 15 Ala. 233; *Northrop v. Bushnell*, 33 Conn. 496; *Crandall v. Lincoln*, 52 Conn. 73; *Zirkel v. Joliet Opera House Co.*, 79 Ill. 334; *Scovill v. Thayer*, 105 Ill. 143; *Bouton v. Dement*, 123 Ill. 142; *Coffin v. Ranadale*, 110 Ind. 417; *Burnham v. N. W. Ins. Co.*, 36 Iowa, 632; *Osgood v. King*, 43 Iowa, 478; *Rider v. Morrison*, 54 Md. 429; *Farnsworth v. Robbins*, 36 Minn. 369; *Vick v. LaRochelle*, 57 Miss. 602; *Fisher v. Seligman*, 7 Mo. App. 363; *Gill v. Bales*, 72 Mo. 424; *Choteau Ins. Co. v. Floyd*, 74 Mo. 286; *Currier v. Lebanon Slate Co.*, 56 N. H. 262; *Slee v. Bloom*, 19 Johns. 456; *Sagory v. Dubois*, 3 Sandf. Ch. 466; *Marshall Foundry Co. v. Killian*, 99 N. C. 501; *Lane's Appeal*, 105 Penn. St. 49; *Bell's Appeal*, 115 Penn. St. 88; *Webster v. Upton*, 91 U. S. 65; *County of Morgan v. Allen*, 103 U. S. 496; *Upton v. Hansbrough*, 3 Biss. 417; *Upton v. Burnham*, 3 Biss. 530; *Upton v. Jackson*, 1 Flippin, 413; *Alling v. Ward*, 2 Am. R. R. & Corp. Rep. 727; *Carter v. Union Printing Co.*, post.

It is immaterial what the form of the arrangement is. In many of the cases cited there was simply a resolution or agreement to accept a certain per cent as full payment for the stock subscribed, or that no calls should be made beyond a certain per cent. The corporation cannot accept a surrender of stock, or buy it in when insolvent, so as to discharge the stockholder as to creditors. *Alling v. Ward*, 2 Am. R. R. & Corp. Rep. 727; *Farnsworth v. Robbins*, 36 Minn. 369; *Crandall v. Lincoln*, 52 Conn. 73; *Currier v. Lebanon Slate Co.*, 56 N. H. 262.

Where a stockholder gave mortgages to secure payment for his stock, which contained a stipulation that they might be paid by a surrender of the stock, and this arrangement was carried out after the company had met with losses and was in an embarrassed condition, the transaction was held to be fraudulent and void. *Burnham v. N. W. Ins. Co.*, 36 Iowa, 632.

In *Bouton v. Dement*, 123 Ill. 142, defendant held stock in a corporation for which he had given his note for \$10,235.55 secured by trust deed. Defendant conveyed the land embraced in the trust deed to an irresponsible employe, who made out a new note and trust deed upon the same for \$11,200. Defendant got the new note substituted for his own, which was surrendered and canceled. Subsequently the corporation pledged the note and the same was sold by the pledgee for \$1,500, its full value, to defendant's brother-in-law, who sold it to plaintiff for the same sum. It was held that defendant was liable to creditors of the corporation to the amount of his original note.

An arrangement by which a subscriber is permitted to substitute shares which he has purchased in place of those which he has subscribed, is voidable as to creditors. *Marshall Foundry Co. v. Killian*, 99 N. C. 501.

It is immaterial that the corporation was solvent at the time of making the arrangement, or that the creditor seeking to set it aside, did not become such until afterward. *Marshall Foundry Co. v. Killian*, 99 N. C. 501; *Vick v. LaRochelle*, 57 Miss. 602. And see numerous cases hereafter cited where such arrangements were made at the inception of the corporation. A contrary rule would seem to be implied in *Zirkel v. Joliet Opera House Co.*, 79 Ill. 334.

A few cases remain to be noticed which may seem to be in conflict with the

foregoing views. In *Nettles v. Marco*, 88 S. C. 47; 11 S. E. Rep'r, 595, the defendant made a special contract with a railroad company to take \$3,500 new or additional stock, to be paid for partly in money and partly in cash, for the purpose of enabling the company to extend its road to H. After he had paid in about \$3,000 on this agreement the extension was abandoned and defendant released from his agreement. The suit was by the receiver of the corporation to recover the balance due by the terms of the agreement, for the benefit of creditors whose debts were contracted before the agreement was made. It was held that the release was binding and the defendant not liable. It is manifest that the creditors in question could not have relied upon the defendant's agreement when they gave credit to the corporation, and that they had been benefited by the amount which had been paid by defendant. They had lost nothing which they had a right to look to when the debt was contracted.

In *Erskine v. Peck*, 13 Mo. App. 280, it appeared that five persons acquired the franchises of a corporation, none of whose stock had ever been issued. They, thereupon, issued the entire stock to themselves as full-paid, but they in fact paid nothing for it. The defendant afterward surrendered his to the company, and the same was sold to *bona fide* subscribers. A year after this transaction took place, the plaintiff became a creditor of the company and, in this action, sought to charge the defendant upon the surrendered stock. The court held that the defendant was not liable, and, after adverting to the authorities cited by the plaintiff, say :

"But none of these authorities, or any others that we have seen, go to the extent which the plaintiff's position here demands. It could not have been intended or supposed in this case, by either the officers of the corporation or the defendant, that a surrender of this stock would in any wise diminish the assets of the company, or the security of its creditors; for the testimony all shows that both parties at least believed the stock to be paid up, and so treated it throughout. On the contrary, the negotiations between the attorney and the defendant, with the ultimate concessions on both sides, or the so-called "compromise," all go to show a common understanding and intention, that the transfer to the corporation by the defendant would create a very important addition to its material assets. Nothing was paid out by the corporation. It does not even appear that there was any formal surrender of whatever claim or title the corporation might have to the bonds retained by the defendant. That the corporation, its capital stock, or the security of its creditors, suffered no real impairment or diminution by the transaction is evident in the fact that the same shares were afterward issued by the company, presumably for value received, to new purchasers or subscribers. It appears from the record that the plaintiff's claim against the corporation arose about a year after the surrender in question, and his judgment was three years later than the same event. There was then neither in the purposes entertained, nor in the practical accomplishment, any thing "given away" by the directors, any deliberate breach of their duty as trustees, or any impairment of the funds to which the plaintiff, in afterward becoming a creditor, might look for his ultimate security. A person competent to own and dispose of personal property, transfers to a party competent to acquire and hold as owner, all his interest in a commodity universally recognized as personalty, having a transferable quality; and this without a shade of interference with the rights or reasonable expectations of any

third party. If a transfer, so circumstanced, is null, it must be because the relation, once established, between stockholder and corporation, is, like the marriage bond, wholly unalterable by mutual agreement of the parties, during their joint lives; or because the corporation is incapable of acquiring or holding its own stock on any terms, after the shares have once been possessed by another. If such be the law, a corporation cannot save itself and its creditors from loss by reacquiring shares from an insolvent person who cannot pay for them, and selling them to one who can; nor can there be any more forfeitures of stock to corporations for non-payment of assessments or other dues. We do not think that the law so stands."

This decision was afterward approved by the Supreme Court, in *Erakine v. Peck*, 88 Mo. 465.

Johnson v. Lullman, 15 Mo. App. 53, is a case arising out of the stock issued to another of the original five holders. He sold his stock to Miller, who purchased it in good faith as paid-up stock. It was held that Miller's estate was not liable on the ground that he was a purchaser for value without notice that the stock had not been paid for, and also on the ground that he had surrendered his stock to the corporation before the debt in question was contracted.

In *Gelpcke v. Blake*, 19 Iowa, 263, the question was as to the sufficiency of a plea setting up a release of contract of subscription. It was alleged that the subscription, which was to the stock of a railroad company, was made in consideration that the road should be constructed on a certain line — that this line was abandoned and, thereupon, the contract was canceled and the money paid thereon refunded. The court held the plea good. The point made was that the plea was not good, because it did not aver consent of creditors and stockholders. The court held that the plea did in effect aver the consent of stockholders, and as to creditors said, that the existence of creditors was "mere assumption," and that it would be time enough to take care of the rights of creditors when it was made to appear that their rights were in jeopardy. In *Singer v. Given*, 61 Iowa, 93, 96, it is said that "the case of *Gelpcke v. Blake*, 19 Iowa, 263, relied upon by appellant, does not hold that the company can make arrangements with stockholders to the prejudice of creditors."

The New Albany cases, which are much relied upon in the two decisions preceding this note, are in brief as follows: Certain citizens of New Albany subscribed for stock in a railroad company and it was part of the subscription agreement that, if the city of New Albany should subscribe for \$50,000 or more of the stock, the subscribers should be allowed to transfer all the stock so subscribed for by them above \$300 to the city, which should accept the same as part of its subscription. The city did subscribe for \$400,000 of the stock, and the transfer was made as agreed upon. The city's subscription was made payable in bonds, and it was arranged that not more than \$250,000 of bonds should be called for, until after a certain part of the road had been constructed; \$200,000 of the bonds were issued and delivered to the company, but shortly after suits were instituted, by taxpayers, to enjoin the levy of taxes to pay interest on the bonds on the ground that the subscription was void. Only \$7,000 of the bonds had been sold by the company, and the litigation concerning them raised such doubts of their validity that they could not be sold except at a ruinous sacrifice. The resources of the company became exhausted and it abandoned its enterprise.

The unsold bonds had been pledged for money to carry on the work and were in danger of being sold for a nominal sum. It was thereupon agreed between the company and the city, that if the latter would pay the indebtedness for which the bonds were pledged, the bonds should be surrendered to the city and its subscription cancelled or released. The agreement was consummated, the city paying about \$36,000. This took place in 1857. In 1868 Burke and others, owners of a judgment against the company rendered in 1857, filed a bill against the company, the city of New Albany and the original subscribers for stock, who had made the transfer to the city, and sought to impeach the transfer and also the cancellation of the city's subscription. The trial court dismissed the bill as to the individual defendants, but entered a decree against the company and the city to the amount due on the judgments sued on. *Putnam v. New Albany*, 4 Biss. 865.

Upon an appeal by the city of New Albany the decree was reversed as to it. *New Albany v. Burke*, 11 Wall. 96. The decision is put upon two distinct grounds, one of which is *laches* and need not be further noticed. The other ground is that the transaction between the city and the company was one within the power of the contracting parties; that it was made in entire good faith; that as much was obtained for the city's obligation as could have been obtained in any other way, and that the proceeds were applied in discharge of the debts of the company which the company had the lawful right to prefer. The city could have discharged its liability as a subscriber by issuing its bonds for the full amount. The company could, of course, have sold their bonds for what they would bring, and could have used the proceeds in paying such debts as they chose. If this had been done, no one would have had any legal ground of complaint. The reasoning of the court is that this, in effect was done, and, therefore, sustain the transaction. The court says:

"It is not to be disputed that, situated as the company was at the time when the contract of August and September, 1857, was made, with the debt of \$36,000 pressing upon it, and with no other means of relief, it might have sold the entire lot of two hundred and forty-three bonds which it held, or was entitled to call for, at the best price that could have been obtained, and might have applied the entire proceeds, had they been needed, to pay that single debt. Of this, neither the stockholders nor the other creditors could have complained. What more has been done now? No doubt such a course would have involved an equal sacrifice to the company and would, in the end, have been more disastrous to the city. Time has revealed that the bonds were worth more than they could have been sold for, but we are to look at the circumstances as they were when the transaction took place, in considering what was its nature and whether it was legal. But if a sale by the company at the market-price, and an application of the whole proceeds to the payment of the \$36,000 debt, would have been unimpeachable, why is it less so because the city became the purchaser? Beyond doubt, the city might lawfully buy its own bonds. Had the company sold to a stranger, and then the city become a purchaser from the stranger, it will not be contended that any creditor of the company could complain. And it can make no difference whether the purchase was made directly or indirectly from the first holder of the bonds, assuming that there was no fraud. The transaction, or the arrangement of August and September, 1857, was, in substance, plainly nothing more than a

purchase by the city of its own bonds, some of which had been issued, and others of which it was under obligation to issue, at the call of the vendor. The price paid was \$36,000, besides some thousands more which the purchaser undertook to pay. Looking at it in the light of subsequent events, it was no doubt an advantageous purchase for the city; and, if the uncontradicted evidence is to be believed, it was deemed at the time an advantageous sale or arrangement for the company. Certainly it did not place the company in any worse position than it must have held had it not been made."

This much being determined, it only remained to consider the good faith of the transaction, and this question being found in favor of the city a decision in its favor necessarily followed. The case is a peculiar one and presents a state of facts not likely to arise in case of an individual subscriber for stock. The peculiar feature of the case is that doubt about the city's power to make the subscription rendered its entire obligation of little or no market value. Although the case is much relied upon in the two reported cases preceding this note, it is one from which no general conclusions can be safely drawn. If an individual should subscribe for stock, give his note for the full amount, and, when the corporation was embarrassed or insolvent, arrange to buy his note at ten cents on the dollar and surrender his stock, it is not likely that any court would permit the transaction to stand as against creditors. See *Bouton v. Dement*, 123 Ill. 142.

3. Arrangements made contemporaneously with the taking of stock for payment at less than par — payment in property or services.— It is now well settled that, in the absence of any constitutional or statutory prohibition, stock may be paid for in property or services. 2 *Beach Priv. Corp.*, § 557; 2 *Mor. Corp.*, § 826; *Peck v. Coalfield Coal Co.*, 11 Brad. 88; *Coffin v. Ransdell*, 110 Ind. 417; *Walburn v. Chenault*, 43 Kans. 352; 23 Pac. Rep'r, 657; *Young v. Erie Iron Co.*, 65 Mich. 111; *Crawford v. Rohrer*, 59 Md. 599; *Liebke v. Knapp*, 79 Mo. 23; *Wetherbee v. Baker*, 85 N. J. Eq. 501; *Fort Madison Bank v. Allen*, 129 U. S. 372; *Phelan v. Hazard*, 5 Dill. 45; *Coit v. North Car. Gold Amalgamating Co.*, 14 Fed. Rep'r, 12. Payment for stock in property, therefore, in good faith, at a valuation honestly made, is the same in effect as payment in money. *Ibid.* The transaction cannot be impeached simply because the valuation turns out to have been excessive, provided the excessive valuation was due to an honest mistake or error of judgment. To set it aside, there must be proof of bad faith or fraud in the transaction. *Peck v. Coalfield Coal Co.*, 11 Ill. App. 88; *Walburn v. Chenault*, 43 Kans. 352; 23 Pac. Rep'r, 657; *Young v. Erie Iron Co.* 65 Mich. 111; *Wetherbee v. Baker*, 85 N. J. Eq. 301; *Bickley v. Schlag*, 46 N. J. Eq. 533; 20 Atl. Rep'r, 250; *Boynton v. Hatch*, 47 N. Y. 225; *Boynton v. Andrews*, 63 N. Y. 93; *Douglass v. Ireland*, 73 N. Y. 100; *National Tube Works Co. v. Gilfillan*, 124 N. Y. 802; 26 N. E. Rep'r, 538; *Coit v. Gold Amalgamating Co.*, 119 U. S. 943; S. C., 14 Fed. Rep'r, 12; *Fort Madison Bank v. Allen*, 129 U. S. 372; *Phelan v. Hazard*, 5 Dill. 45.

In *Bickley v. Schlag*, 46 N. J. Eq. 533, the chancellor found that \$75,000 of stock was issued as fully paid for property worth only \$64,000, and decreed that the stockholders were still liable to the creditors for the difference. In reversing the decree the court of errors and appeals says: "If we were to assume that this proceeding had any legal foundation whatever, the fact would still remain that the real question presented by it has neither been consid-

ered nor decided. In view of the proof in the case it was not, and could not be, disputed that the stock in question, as between these stockholders and the corporation, had been paid for in full; for they had transferred to the company, in satisfaction for it, certain steamboats and other property, each share so purchased being marked with the words: "Issued for property purchased." Consequently, so long as this contract of sale subsisted, an indisputable title to the stock existed in the stockholders, and it was also thereby conclusively established that they were in no wise indebted to the company by reason of their purchase. The inquiry, therefore, in the court below should have been whether the agreement in question was fraudulent or not; for, if the transaction was an honest one, the difference in value between the property constituting the consideration of the sale and the stock had no legal significance. The charter of this company authorizes the corporation to exchange its capital stock for property, and, under the condition of things, a court of equity cannot set aside a transaction of that kind simply on the ground that the bargain on the part of the corporation is a disadvantageous one. In such transactions the company and the purchaser stand upon the common footing of buyer and seller. The valuation of property in making the exchange, either on the one side or the other, cannot be supervised or controlled by the court of chancery, for, in the absence of deceit, or some other corrupt constituent, the bargain between the parties cannot be disturbed. In the present instance fraud was not found, and the vice-chancellor ordered these stockholders to pay more than they had agreed to pay for the stock, on the ground that, in his opinion, the steamboats and other things they had exchanged were not worth as much as the stock was worth. Conspicuously, the substance of the true issue has been overlooked." Similar language will be found in *Coit v. Gold Amalgamating Co.*, 119 U. S. 845, and *Fort Madison Bank v. Allen*, 129 U. S. 372.

Of course it follows that, if the transaction by which stock is paid for in property or services is fraudulent, it may be set aside at the instance of creditors. See the cases last above cited and also *Whitebill v. Jacobs*, 1 Am. R. R. & Corp. Rep. 165; *First National Bank v. Gustin-Minerva Min. Co.*, 1 Am. R. R. & Corp. Rep. 272; *Elyton Land Co. v. Birmingham Warehouse, etc., Co.*, post; *Osgood v. King*, 42 Iowa, 478; *Chisholm v. Forney*, 65 Iowa, 388; *Boulton Carbon Co. v. Mills*, 78 Iowa, 460; *Crawford v. Rohrer*, 59 Md. 599; *Chouteau v. Dean*, 7 Mo. App. 210; *Shields v. Watts*, 94 Mo. 410; *Bailey v. Pittsburgh, etc., Coal and Coke Co.*, 69 Penn. St. 334; *Preston v. Cincinnati, etc., R. Co.*, 36 Fed. Rep'r, 54.

What is meant by the rule that the transaction must be fraudulent in order to be capable of impeachment is, that it must be fraudulent *as to creditors*. It need not necessarily be fraudulent as to the corporation. The transaction may be entirely fair and legitimate as between the corporation and the stockholder and yet be a fraud upon creditors. In such a transaction, the corporation and stockholder are dealing with a trust fund or obligation, in the absence and without the consent of the *cestui que trust*. In such a case whatever is not fair and right in equity is a fraud in law upon the *cestui que trust* and he may have it set aside, if he brings himself otherwise within the rules for equitable relief. A contrary view is held in *Coffin v. Ransdell*, 110 Ind. 417. It is there decided that the fraud to be available must be a fraud upon the corporation. This view would give the creditors no other or greater rights than the corpora-

tion has, and is contrary to the spirit of all the decisions relating to the trust character of corporate subscriptions.

A grossly excessive valuation affords a strong presumption of fraud. *Boyn-ton v. Andrews*, 68 N. Y. 93; *Coit v. Gold Amalgamating Co.*, 119 U. S. 843. And where stock is paid for with property which is deliberately overvalued for the purpose, the presumption of fraud is conclusive. *Douglass v. Ireland*, 78 N. Y. 100; *Boyn-ton v. Andrews*, 68 N. Y. 93.

The logic of the cases of *Bever v. Clark*, 189 U. S. 96, and *Fogg v. Blair*, 189 U. S. 118 (reported ante), is that if a transaction by which stock is paid for in property or services worth less than the par of the stock is not fraudulent as to creditors, then it cannot be impeached by them. If, as matter of fact, they are not put in any worse position by it, or if they have actually gained by it, then they have no ground of complaint. The case of *Van Cott v. Van Brunt*, 82 N. Y. 535, belongs to this class. In that case Van Brunt being president of the Hudson Avenue Railroad Company, entered into a contract on behalf of the company with one Cowperthwaite, by which the latter, for a certain sum in stock and bonds of the company, agreed to build and equip a certain portion of the road. Cowperthwaite assigned the contract to Van Brunt, pursuant to an arrangement previously made, who, with others associated with him, proceeded to perform the contract, and thereupon obtained the stipulated compensation. The whole arrangement was assented to by the stockholders and appears to have been the only way in which the company could get its road constructed.

It was held that Van Brunt could not be made liable to creditors, as for an unpaid balance on the stock so received by him, on the ground that the value of the work and materials done and furnished by him under the contract was less than the par value of the stock. The court of appeals found that there was no fraud in the transaction and that the value of the work done was equal to or greater than the actual value of the stock and bonds. It does not appear when the debts in question were contracted, whether before or after the transaction was had. It would seem to us that the correctness of the decision as a matter of general law would depend upon the answer to this question.

4. Same subject continued — stock taken in discharge of indebtedness to corporation.— A debt is a species of property. When a debt owed by a corporation to an individual is used for the purpose of paying for stock received from the corporation, the same rules apply as when the stock is paid for in any other species of property. No ground for a distinction exists. There can be no honest over-valuation of an indebtedness. It may be worth less but cannot be worth more than its face. Consequently when stock is taken in payment of a debt, the exchange must be made dollar for dollar, otherwise the transaction is fraudulent as to creditors and may be impeached in equity. *Jackson v. Fraer*, 64 Iowa, 469; *Boulton Carbon Co. v. Mills*, 78 Iowa, 460; *Chouteau v. Dean*, 7 Mo. App. 210; *Kehlor v. Lademann*, 11 Mo. App. 550. The first of these cases will be noticed hereafter. See § 6 of this note. In *Chouteau v. Dean*, 7 Mo. App. 210, the corporation owed the defendant for his services as president, \$2,500. The corporation voted to pay him in stock at its market value, which was twenty-five cents on the dollar. The defendant accordingly made a bill to the company for \$10,000 and received that amount of stock in payment. He was held liable for the difference between the par valu-

of his stock and the real value of his services. In *Kehlor v. Lademann*, 11 Mo. App. 550, the corporation owed the defendant \$88,955.45. It issued to him and he accepted \$84,000 of stock in payment of the debt. He was held liable for the difference of \$44.55.

5. Same subject continued — bonus stock. — In *Christensen v. Eno*, 106 N. Y. 97, it held that one, who is already a stockholder in a corporation, to whom additional stock is issued as a gratuity, is not liable to creditors as a subscriber for such stock. The court says:

"There is no pretense that the defendant Eno ever subscribed for the twenty-five shares of bonus stock (so called), or entered into any engagement to pay the forty per cent credited thereon. This was distinctly contrary to the intention of all parties. The plaintiff seeks to charge him as though he had subscribed for the stock and entered into a contract obligation with the company to pay the forty per cent. We can see no ground upon which he can be made to respond to the creditors of the company as upon an unpaid subscription. Assuming that the transaction, as to the company, was *ultra vires*, or that it could not give away its shares, the transaction in that view was simply a nullity, and Eno got nothing as against any one entitled to question the transaction. But it did not convert him into a debtor of the company for the forty per cent. He entered into no contract to pay it. He has received nothing on account of the twenty-five shares, and it is not claimed that the charter in terms imposes the liability claimed. The unissued shares of a corporation are not assets. When issued they represent a proportionate interest of the shareholder in the corporate property — an interest, however, subordinate to the claims of creditors. There are unquestioned public evils growing out of the creation and multiplication of shares of stock in corporations not based upon corporate property. The remedy is with the legislature. But the liability of a shareholder to pay for stock does not arise out of his relation, but depends upon his contract, express or implied, or upon some statute, and in the absence of either of these grounds of liability, we do not perceive how a person to whom shares have been issued as a gratuity has, by accepting them, committed any wrong upon creditors, or made himself liable to pay the nominal face of the shares as upon a subscription or contract."

The contrary is expressly held in *Handley v. Stutz*, 139 U. S. 417, 426-428, to which this note is appended. In this case three hundred out of eight hundred shares of an increase of stock were distributed among the old stockholders without any consideration whatever and with the express understanding that they were to be deemed fully paid and "free from all claims or demands on the part of the company." The acceptance of the certificates was held to imply an agreement to pay their par value and they were held liable to creditors therefor.

The same view was held in *Boulton Carbon Co. v. Mills*, 78 Iowa, 460, where \$1,000 of stock was issued to one as a bonus, in order to induce him to act as president of the corporation. He was held liable to creditors for the par value of the stock.

5. Same subject continued — agreements concurrent with the subscription for a discharge of the subscriber without full payment. — It has been repeatedly adjudicated that all agreements or understandings, whether secret or otherwise, made between the corporation and the stockholder, concurrently with a

subscription for stock, no matter what the form of the contract, and even though made a part of the subscription agreement, by which the subscriber is only to be required to pay a percentage of the par value of the stock, are voidable as to creditors, and the subscriber or stockholder remains liable to creditors, for the full par value, notwithstanding such agreements or understandings. *Melvin v. Lamar Ins. Co.*, 80 Ill. 446; *Union Ins. Co. v. Frear Stone Mfg. Co.*, 97 Ill. 537; *Jewell v. Rock River Paper Co.*, 101 Ill. 57; *Hickling v. Wilson*, 104 Ill. 54; *Great Western Tel. Co. v. Gray*, 122 Ill. 630; *Bates v. Great Western Tel. Co.*, 134 Ill. 588; *Winston v. Dorsett Pipe & Paving Co.*, 129 Ill. 64; *Oliphant v. Woodburn Coal & Min. Co.*, 63 Iowa, 333; *Tama Water-Power Co. v. Hopkins*, 79 Iowa, 653; *Safford v. Barnes*, 39 Miss. 399; *Skrainka v. Allen*, 7 Mo. App. 434; *White Mt. R. Co. v. Eastman*, 34 N. H. 124; *Thompson v. Lake*, 19 Nev. 108; *Hervy v. Vermillion, etc., R. Co.*, 17 Ohio, 187; *Robinson v. Pittsburgh, etc., R. Co.*, 33 Penn. St. 334; *Morrow v. Nashville Iron & Steel Co.*, 37 Tenn. 262; *Blodgett v. Morrill*, 20 Vt. 509; *Clarke v. Lincoln Lumber Co.*, 39 Wis. 655; *Sawyer v. Hoag*, 17 Wall. 610; *Upton v. Tribilcock*, 91 U. S. 45; *Sanger v. Upton*, 91 U. S. 56; *Scovill v. Thayer*, 105 U. S. 143; *Flinn v. Bagley*, 7 Fed. Rep'r, 785; *In re Glenn Iron Works*, 17 Fed. Rep'r, 324; 2 Mor. Corp., § 848; 1 Beach Corp., § 117; *Cook Stock & Stockh.*, § 42.

In *Sawyer v. Hoag*, 17 Wall. 610, the defendant subscribed for \$5,000 of stock with an understanding that only fifteen per cent should be paid in cash. He, however, paid in \$5,000 and received back \$4,250 in the form of a loan, for which he gave his notes with security, and the stock was issued and treated as fully paid. The court held the transaction to be but a subterfuge to avoid the trust character of the subscription and decreed payment of the balance for the benefit of creditors. The court says:

"Though it be a doctrine of modern date, we think it now well established, that the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund for the benefit of the general creditors of the corporation. And when we consider the rapid development of corporations as instrumentalities of the commercial and business world in the last few years, with the corresponding necessity of adapting legal principles to the new and varying exigencies of this business, it is no solid objection to such a principle that it is modern, for the occasion for it could not sooner have arisen.

* * * * *

"Nor do we think the relation of the appellant in this case to the corporation is without weight in the solution of the question before us. It is very true, that by the power of the legislature there is created in all acts of incorporation a legal entity which can contract with its shareholders in the ordinary transactions of business as with other persons. It can buy of them, sell to them, make loans to them, and in insurance companies, make contracts of insurance with them, in all of which both parties are bound by the ordinary laws of contract. The stockholder is also relieved from personal liability for the debts of the company. But after all, this artificial body is but the representative of its stockholders, and exists mainly for their benefit, and is governed and controlled by them, through the officers whom they elect. And the interest and power of legal control of each shareholder is in exact proportion

to the amount of his stock. It is, therefore, but just that when the interest of the public, or of strangers dealing with this corporation is to be affected by any transaction between the stockholders who own the corporation and the corporation itself, such transaction should be subject to a rigid scrutiny, and if found to be infected with any thing unfair toward such third person, calculated to injure him, or designed intentionally and inequitably to screen the stockholder from loss at the expense of the general creditor, it should be disregarded or annulled so far as it may inequitably affect him."

In *Union Ins. Co. v. Frear Stone Mfg. Co.*, 97 Ill. 537, the court says: "The capital stock of a corporation, by most recent decisions, is a trust fund that the directors may not give away or misappropriate to the prejudice of parties whom they have invited to deal with the corporation. The state grants the franchise on the understanding the corporation created will have a capital stock, and the amount is usually fixed before the state parts with the franchise. It is for the security of all persons that deal with the corporation, as well as to afford the means to accomplish the objects of the incorporation. When the charter has fixed the minimum amount of capital stock, what warrant have the stockholders for saying a less amount shall constitute the capital stock? It would simply abrogate, by private agreement, that provision of their charter. Any device, by which the members of a corporation seek to avoid the liability which the law imposes upon them, is void as to creditors, whether binding or not as between themselves. Of this character is an agreement among the members that the shares of the capital stock of the corporation shall be regarded as "fully paid up." Such shares so issued are said to be *ultra vires*, at least to the extent that, on the winding up of the corporation, such shareholders will be adjudged contributories, unless it shall appear they have given for such stock the equivalent in money or in money's worth. Nor is it in the power of the shareholders, by private agreement with the corporation, to make the shares of stock issued to them non-assessable so as to excuse payment for such stock at its par value. That would deprive creditors of all security, which is the very thing the legislature intended to guard against by the provision in its charter, the corporation should have a certain capital stock. The authorities that sustain these views are cited in *Thompson's Liability of Stockholders*, section 129, and in *Green's Brice's Ultra Vires* 143."

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"There is no ground for believing the state would have granted a franchise to this corporation, had it been known its capital stock would not exceed the sum fixed by the stockholders. Such an agreement is inimical to the rights of creditors, and plainly against a sound public policy. Whether so intended or not, it might be the source of injury to persons trusting the corporation on the faith of its capital stock. The books showed the stock had all been issued, and a person dealing with the corporation may have known the shareholders were responsible, and so given credit to the concern. It would be a novel doctrine if shareholders, after the corporation had incurred large liabilities on the faith of the security supposed to be afforded by the stock held by them, will be permitted to avail of a private agreement between themselves and the corporation whose stock they hold, to the effect, no assessment shall ever be made on the stock of the company, or as in this case, that they have

and the company have a right to take possession of the same, and to sell the same, and to use the proceeds of the sale for the payment of the debts of the company, and to distribute the balance among the shareholders, and to make any other use of the same as they may think proper. The company shall also have the right to make any other use of the same as they may think proper.

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which they are not entitled, would work untold mischief. Such a rule would not only tend to enable irresponsible corporations to entrap the unwary, but would tend to impair the credit of responsible corporations. Whenever it comes to be understood that it is legal for a corporation to do business upon a fictitious basis, suspicion will necessarily fasten to some extent upon all corporations. The statute provides that the amount of capital stock subscribed and the amount of capital actually paid in must be kept posted in the principal place of business, and be subject to public inspection. Code, § 1077. It also provides that an execution against the company may be levied upon the private property of stockholders to the amount of that portion of their stock which remains unpaid. Code, § 1082. If a corporation can legally issue stock as fully paid, which is not fully paid, or what is the same thing in effect, receive part payment, and issue the stock with an agreement that the balance should never be called for, then the posted statement when stock is so issued, would, though conforming to the law, be utterly deceptive upon one point. The statute assumes that the public is entitled to know, not only how much capital has actually been paid in, but how much has been subscribed. But under the rule contended for, subscriptions to stock beyond what is actually paid, in cannot be relied upon, because there may be a secret agreement having the effect to nullify what would otherwise be the stockholder's legal obligation. We cannot think that the law provides for a posted statement to serve as a guide to the public, and at the same time provides that the statement may contain a substantial falsehood upon a material point. It is not important to inquire what posted statement was made in relation to the stock in question, whether it showed the stock fully paid, or one-fifth paid, as the fact really was. The posted statement could not affect the defendant's liability. But it is manifest that if it is lawful to issue stock as fully paid when it is not fully paid, or with an agreement that full payment shall not be called for, and stock is so issued, then the posted statement should show the specific agreement. But as no such showing is provided for, we conclude that such agreement is not contemplated, and is not, therefore, to be regarded as allowable.

"The true rule undoubtedly is that shares should be paid for in full, or be subject to be paid for in full, either in money or in property, the value of which, if estimated in good faith, to be equal to the par value of the shares. Whoever subscribes for stock in an incorporated company has a right to assume that all subscribers, whether prior or subsequent, become such upon substantially the same basis. The statute requires that the articles of incorporation shall show definitely the amount of capital stock authorized. This is important for several reasons. Subscribers have a right to judge for themselves whether the amount authorized will be sufficient for the successful prosecution of the business. Creditors also have the same rights. But if the rule shall be adopted that directors may issue stock upon the receipt of any sum, no matter how small, and provide that the stock shall be treated as fully paid, or what is the same thing, that the remainder of the par value shall never be called for, no person could safely subscribe for stock in an incorporated company. However well conceived the enterprise might be, and however judiciously the company might be organized, it would involve nothing but peril, if the directors at their pleasure could be

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"The use of computers has been an important factor in the development of the modern scientific method. It has enabled us to handle large amounts of data, to perform complex calculations, and to visualize the results of our experiments. This has led to a rapid increase in our knowledge of the natural world, and to the development of new technologies that are improving our lives. The use of computers is still in its early stages, but it is clear that it will continue to play a major role in the advancement of science and technology in the future."

It is generally held that if a stock has been issued to and accepted by the person entitled to be charged, there should be no order to nullify a written agreement. *Windsor & Dunlop v. M. & C. Carter*, 35 Penn. St. 185. But our court in 1874 in an agreement to take stock held that the contract was not binding when a writing was executed by the company, creating the relation of stockholder. The essence of a contract is such that it is not necessary. See *Taggart v. B. & C. and another*, 100 Mass. 201. But where the person sought to be charged has a ready-made contract by an acceptance of certificates, the nature of the written agreement to take stock is superseded. The relation of stockholder is not a legal necessity. Whether the relation exists the law knows, and it is not an act of the stockholders. We have seen no case where the parties to a contract between some stockholders who become such in pursuance of a written agreement and those who become such by the mere acceptance of stock issued to them. To hold then that where there is an agreement in writing to take stock, even though it is not taken it must be paid for as provided in the articles of incorporation, and that it need not be there paid for if taken without such agreement, would be to make a distinction for which we find no warrant in the decisions, and for which there is certainly none in principle.

"It is undisputed that a mere transferee of stock not fully paid becomes liable to pay the balance, unless the stock has been issued as fully paid, and he has acquired the same in ignorance that it was not fully paid in fact. The liability

of a transferee does not arise by reason of an express contract with the company. His liability is imposed by law as arising by implication out of the relation of stockholder. It would be strange if there were not the same implication where a person takes stock directly from the company, though he does so only by oral agreement. He is not the less a stockholder, and is not entitled to less rights as a stockholder. There is no reason why his rights should be disproportionately greater than his burdens.

"No one we think, in this state thus far, when desiring to estimate the responsibility of a corporation, has thought of inquiring further in respect to its issued stock than was necessary to ascertain the amount issued. If we should hold the rule contended for, the amount of stock issued would not of itself furnish any indication in regard to the responsibility of the company. Whoever should desire to estimate the responsibility of a given corporation would need to ascertain all the agreements, written and oral, open and secret, under which the stock had been issued.

"We are aware that a corporation which commences to incur the hazards of business with its stock only partly taken, may find itself in a condition which would render it impossible for it to dispose of its stock at par. Whenever a corporation enters upon business which its resources do not justify, it is guilty of an irregularity. But that is no reason why it should be allowed to receive itself by perpetrating another irregularity, and one which the law denominates as fraud.

"The true theory is that the capital stock of a corporation is fixed with reference to its supposed largest needs, to be all subscribed, and to be paid for in cash at once, or to be called in from time to time, in successive installments, as the actual needs of the corporation may require. Whenever a corporation has imprudently commenced business, and incurred hazards, with a partial and insufficient amount of stock taken, and can dispose of no more stock at par, such corporation is ordinarily a source of danger to the public, and when such the sooner it is wound up the better. The courts certainly should not aid it to prolong its existence by methods which the statute does not contemplate.

* * * * *

"One position taken by the defendants remains to be noticed, and that is that the stock issued as fully paid was entirely worthless. In our opinion the worthlessness of the stock would not enable the defendants to escape the statutory liability. If the stock was worthless, as the defendants claim, there was so much the greater reason why the stockholders should not hold themselves out under false pretenses. If the stock was worthless, and the contract by which it was issued was based upon that theory, as we understand the defendant's counsel to claim, it seems to us that the conduct of Traer and Greene was without a shadow of excuse. They must have had a motive altogether independent of the value of the stock, and it is difficult to see how that motive could have been other than a corrupt one."

7. Stock paid for in property or services fraudulently overvalued is only paid for to the extent of the actual value of such property or services, and the stockholder is liable for the balance to creditors.—Some text-writers have asserted that when stock has been issued for property or services fraudulently overvalued for the purpose, the creditor has merely the option of accepting the transaction as made or of rescinding it *in toto*, and cannot treat the

stock as only partially paid for and hold the stockholder liable for the balance. *Cook Stock & Stockh.*, §§ 44, 47; 1 *Beach Priv. Corp.*, § 120.

It does not seem to us that this position is justified either by reason or authority. In the following cases it has been expressly held to the contrary: *Elyton Land Co. v. Birmingham Warehouse, etc., Co.* (Ala.), post; *Osgood v. King*, 42 Iowa, 478; *Jackson v. Traer*, 64 Iowa, 469; *Chisholm v. Forney*, 65 Iowa, 833; *Boulton Carbon Co. v. Mills*, 78 Iowa, 460; *Libbey v. Tobey* (Me.), 2 Am. R. R. & Corp. Rep. 281; *Crawford v. Rober*, 59 Md. 539; *First Nat. Bank v. Gustia-Minerva Min. Co.* (Minn.), 1 Am. R. R. & Corp. Rep. 373; *Shickle v. Watts*, 94 Mo. 410; *Chouteau v. Dean*, 7 Mo. App. 210; *Kebler v. Lademann*, 11 Mo. App. 550; *Wetherbee v. Baker*, 35 N. J. Eq. 501; *Bailey v. Pittsburgh, etc., Coal & Coke Co.*, 69 Penn. St. 334; *Whitehill v. Jacobs*, 75 Wis. 474; S. C., 1 Am. R. R. & Corp. Rep. 165; *Preston v. Cincinnati, etc., R. Co.*, 36 Fed. Rep'r, 54. The doctrine that one receiving stock for property fraudulently overvalued is to be regarded as a subscriber for the stock and as liable for the par value of the stock less the actual value of the property is fully recognized in *Colt v. Gold Amalgamating Co.*, 119 U. S. 343. This was a suit to hold stockholders liable to creditors on the ground that they had received paid-up stock for property fraudulently overvalued, and that they were liable to the extent of the over-valuation. The court decided for the defendants on the ground that the fraud was not made out, and also on the ground that the complainant had notice, at the time the debt was contracted, of the manner in which the stock had been paid for. But the court says: "If it were found that actual fraud was committed in the payment of the stock, and that the complainant had given credit to the company from a belief that its stock was fully paid, there would undoubtedly be substantial ground for the relief asked." Page 345. See, also, *Flinn v. Bayley*, 7 Fed. Rep'r, 785; *Young v. Erie Iron Co.*, 65 Mich. 111.

In *Osgood v. King*, 42 Iowa, 478, where \$190,000 of paid-up stock was issued for land not worth to exceed \$37,500, the court says:

"Under such circumstances every principle of honesty and justice requires that, as between a stockholder and a creditor, the stock shall be considered paid only to the extent of the fair value of the property conveyed, and that, for the balance, the stockholder shall be held individually liable, in the event of his failure to point out corporate property subject to levy. Under no other construction can the rights of innocent persons be protected, and laudable enterprises be, at the same time, fostered and encouraged. It would be a reproach to the law if the officers of a corporation could be permitted to advertise its capital stock to a large amount, and then, by a mere arrangement between themselves and the stockholders, accept payment in property of a merely nominal value, and, without incurring individual liability upon themselves or the stockholders, make the stock in fact one-seventh, or one-tenth, or one-twentieth the amount advertised."

In *Chisholm v. Forney*, 65 Iowa, 833, the entire stock of a corporation was issued as fully paid in exchange for a patent right. The patent was believed to have some value at the time, but it is manifest from the report that it was not regarded as worth the par value of the stock. It turned out to be worth less. The stockholders were held liable to creditors for the full amount of their stock. The court says:

"Persons dealing with the corporation had the right to assume that it owned available assets to the amount of the capital stock; that is to say, that, in consideration for the stock issued, the corporation had received money or property which would be available to pay any indebtedness incurred in its business. A patent is, as has been said, 'a property in notion, and has no corporal, tangible substance,' and cannot be levied on and sold under execution issuing from the state courts; and whether it can be sold on executions issuing from the federal courts is regarded as doubtful. *Stephens v. Cady*, 14 How. 538; *Stevens v. Gladding*, 17 How. 447. Until its usefulness has been established, the value of a patent right is purely speculative.

"In the present case, the appellants believed the patent to be valuable, but it in fact was worthless. It was not and could not be made available for the purpose of paying the indebtedness of the corporation. In payment for the stock issued to them by the corporation, the defendants transferred to it their interest in this worthless patent. It seems to us, as was said in *Osgood v. King*, 43 Iowa, 478, that it would, 'be a reproach to the law,' if, under these circumstances, the appellants are not individually liable to the creditors of the corporation to the extent of their subscription to the capital stock. As the appellants did not pay any value for their stock, they are liable in this action, under sections 1082 and 1084 of the Code. The former is as follows: 'Neither any thing in this chapter contained, nor any provisions in the articles of incorporation, shall exempt the stockholders from individual liability to the amount of the unpaid installments on the stock owned by them, or transferred by them for the purpose of defrauding creditors; and execution against the company may, to that extent, be levied on the private property of any such individual,' as provided in section 1084. Under the statute, the stockholder's liability is fixed by a simple failure to pay for the stock issued to him, and the right of the creditor is in no respect impaired for the reason that his interest in the patent cannot be returned. The creditor's right is independent of that of the corporation, and he is not required to proceed in equity and have the contract between the stockholders and the corporation rescinded. When the defendants received the stock, there was implied by law an obligation, as between them and the creditors of the corporation, that they would pay for it."

In *Crawford v. Rohrer*, 59 Md. 599, property equal to the par value of stock was given in payment of the stock, but the corporation also paid the owners of the property a certain sum in money. The effect of the transaction was that the stock was paid for with property overvalued to the extent of the money paid back to the stockholders. The latter were held liable to creditors to this extent, the court saying:

"It has been again and again decided that the unpaid subscriptions to the capital stock of a corporation constitute a trust fund for the benefit of the general creditors of the corporation, and that this trust cannot be defeated or the fund impaired by a simulated or pretended payment for the stock taken, nor by any device short of actual payment in good faith. Any arrangement, therefore, among the stockholders, or those in charge of the affairs of the corporation, by which the stock is but nominally paid for, whether in money or property, the corporation not in fact getting the benefit of the price in good faith, will be regarded as a sham, and not as a valid payment, as against the

conditions of the corporation, however it may be regarded as between the corporation and the subscriber. *Sawyer v. Hoag*, Amignee, 17 Wall. 610; *Rider v. Morrison et al.*, Receivers, 54 Md. 429. As between the creditors of the corporation and the original holders of the stock, as is the case here, it in no manner affects the rights of the former that the stock has been issued as fully paid-up stock, for their rights depend, not upon the mere appearance of things, but upon the actual *bona fide* payment by the stockholder, whether that payment be alleged to have been made in money or property."

We do not understand that the doctrine of these cases is in any essential degree the result of statutory enactments; it is worked out upon the general principles which apply to the subject.

The doctrine of the foregoing cases is supported by the numerous cases, already cited, in which various agreements, made concurrently with the taking of stock, and, it may be, forming part of the subscription contract itself, by which the stock liability might be satisfied in some other way than by payment in full, have been disregarded, and the holders of the stock held as upon an absolute promise to pay the par value of the stock in full. Among these cases the following may be particularly noted. *Maan v. Cooke*, 20 Cooke, 178; *Melvin v. Lamar Ins. Co.*, 60 Ill. 446; *Great Western Tel. Co. v. Gray*, 122 Ill. 630; *Winston v. Dorsett Pipe & Paving Co.*, 129 Ill. 64; *Bates v. Great Western Tel. Co.*, 134 Ill. 536; *S. C.*, 25 N. E. Rep'r, 521; *Baraham v. Northwestern Ins. Co.*, 36 Iowa, 632; *Singer v. Given*, 61 Iowa, 98; *Jackson v. Traer*, 64 Iowa, 469; *Thompson v. Lake*, 19 Nev. 103; *White Mt. R. Co. v. Eastman*, 34 N. H. 124; *Henry v. Vermillion, etc., R. Co.*, 19 Ohio, 187; *Noble v. Callender*, 20 Ohio St. 199; *Morrow v. Nashville Iron & Steel Co.*, 87 Tenn. 292; *Sawyer v. Hoag*, 17 Wall. 610; *Upton v. Tribilcock*, 91 U. S. 45; *Sanger v. Upton*, 91 U. S. 56; *Scovill v. Thayer*, 105 U. S. 143.

The logic of these decisions is that, as to creditors, the acceptance of stock in a corporation implies a promise to pay the par value thereof in money or money's worth, and this promise, though it may be only implied, prevails over all inconsistent understandings and agreements between the corporation and the stockholder. In *Flinn v. Bagley*, 7 Fed. Rep'r, 785, the court, after adverting to the line of cases last above cited, says: "The general drift of the opinions is to the effect that the acceptance of a certificate of stock, not fully and actually paid up, *ipso facto* obligates the holder to make up its par value, if the duty of the corporation to its creditors requires it, although he originally agreed to take the stock as fully paid up." Page 790.

If a person, who agrees with a corporation that he shall have fully-paid stock issued to him for twenty per cent of its face in cash, may be held liable to creditors for the remaining eighty per cent, there does not seem to be any reason why one, who has made a similar agreement to have fully-paid stock issued to him for property understood to be worth but twenty per cent of the face of the stock, should not be held liable to creditors to the same extent as the former.

8. Liability of the transferees of stock not fully paid.—As a general rule the transferee of stock stands in the shoes of his vendor, and after the transfer has been made upon the books, he is liable to the corporation or to creditors to the same extent as the original holder of stock, except as hereafter noted. *Webster v. Upton*, 91 U. S. 65; *Pullman v. Upton*, 96 U. S. 828;

Libbey v. Tobey, 2 Am. R. R. & Corp. Rep. 288; Moses v. Ocoee Bank, 1 Lea, 398; Upton v. Hansbrough, 8 Biss. 417.

"If the law implies a promise by the original holders or subscribers to pay the full par value when it may be called, it follows that an assignee of the stock, when he has come into privity with the company by having stock transferred to him on the company's books, is equally liable. The same reasons exist for implying a promise by him as exist for raising up a promise by his assignor." Webster v. Upton, 91 U. S. 65, 69.

In case of stock issued as fully paid when not so in fact, a purchaser of the stock, without notice that the same is not fully paid, will not be liable to the corporation or to creditors for any balance due upon the stock. Brant v. Ehlen, 59 Md. 1; Skrainka v. Allen, 76 Mo. 384; Erakine v. Loewenstein, 82 Mo. 301; West Nashville Savings Bank v. Nashville Savings Bank, 86 Tenn. 252; Steacy v. Little Rock, etc., R. Co., 5 Dill. 848; Libbey v. Tobey, 2 Am. R. R. & Corp. Rep. 281, and note; 1 Beach Priv. Corp., § 181; 2 Mor. Corp., § 896; Cook Stock & Stockha., § 50.

The converse of the proposition is true, and, consequently, if the purchaser has notice of how the stock was paid for, or that it is only partly paid for, he will be liable to the same extent as though the transaction by which it was issued as fully paid had been had with himself. Ibid. Also, First Nat. Bank v. Hingham Mfg. Co., 127 Mass. 563. See, also, Boynton v. Hatch, 47 N. Y. 225; Bailey v. Coal Co., 69 Penn. St. 334.

The liability of transferees in such cases and the question of what constitutes notice and who is to be considered a purchaser in good faith are discussed in the note to Libbey v. Tobey, 2 Am. R. R. & Corp. Rep. 281. The recent case of West Nashville Savings Bank v. Nashville Savings Bank, 86 Tenn. 252, is important on the question of who is to be regarded a purchaser in good faith so as to be exempt from future calls or assessments upon the stock. In that case T. subscribed for stock in the plaintiff bank, and, after payment of fifty per cent of the par value, certificates were issued to him in the following form:

"Shares \$100 each.

"West Nashville Planing-Mill and Lumber Company, Nashville, Tenn.:

"This is to certify that J. B. Tucker is entitled to thirty-five shares of \$100 each, in the capital stock of the West Nashville Mill and Lumber Company of Nashville, subject to all the conditions and stipulations contained in their articles of incorporation, transferable by him or his attorney only on surrender of this certificate.

"In testimony whereof, the president and secretary of said company have hereunto subscribed their names.

"R. F. WOODARD, *President*,

"T. O. TREANOR, *Secretary*."

* * * * *

T. pledged the stock to the defendant bank, which had the same transferred to it on the books of the company, and received certificates identical in form with those issued to T. It will be observed that the certificates contained no recital that they were fully paid, nor does it appear that there was any thing on the books of the company to that effect. On the other hand, they gave no notice

that they were not fully paid, unless the words, "subject to all the conditions and stipulations contained in their articles of incorporation," can be regarded as such notice. The defendant bank was held to be a purchaser in good faith and not liable for the amount actually unpaid upon the stock. The court says:

"The question arising upon the certificates in this case is not so easy of solution, inasmuch as there is no express declaration on the face of it that the shares are non-assessable or paid up. In such a case the question is a perplexing one as to whether the purchaser of such shares is bound, at his peril, to make inquiry, or whether he is not protected by the want of notice.

"This certificate is in the usual commercial form of certificates issued for shares fully paid up. There is no intimation upon its face that it is not what it appears to be. The corporation, in putting such shares upon the market, has put it in the power of the subscriber to sell the same to persons innocent of the true fact. Under such circumstances ought the corporation to be suffered to demand from an innocent transferee for value, the balance of the subscription price? Certificates of stock are *quasi* negotiable securities. The vast number of such shares daily sold upon the market have led the courts to aid their commercial and negotiable character in favor of purchasers without notice of secret liens.

"Thus an assignment of a certificate of stock is held to pass the legal title to such shares to the assignee, even without transfer upon stock-book or other notice to the corporation. *Cornick v. Richards*, 8 Lea, 1.

"Again, this court held that if the pledgee of a stock certificate, with blank power of attorney, subpledge such certificate for money loaned, the subpledgee, if ignorant of the title of his pledgeor, will hold the certificate as against the true owner. *Cherry v. Frost*, 7 Lea, 1.

"In view of the important character assumed by shares of stock in both the speculative and investment markets, and in view of the readiness with which corporations can guard themselves, as well as purchasers of such shares, by issuing only fully-paid shares, or by expressing upon the face of such as are not paid up the fact that they are subject to call for unpaid subscription price, we hold, in the interest of the negotiability of such shares and of what we deem a true public policy, that a *bona fide* purchaser of a certificate of stock, for value, and without notice, either from the face of the certificate or otherwise, that the subscription price has not been paid, will be protected as between himself and the corporation negligently issuing such shares. This rule we regard as most in accord with the usages, customs and demands of commerce, and as calculated to prevent the assumption of unsuspected liabilities on the one hand, and the illegitimate use of unpaid shares of stock on the other. *Cook Stocks*, §§ 50, 257.

"The rule is in analogy with the principles governing contracts, as there can be no implied contract to pay unpaid calls where the purchaser buys what he is entitled to believe are paid-up shares.

9. Waiver by creditor of right to enforce unpaid subscriptions, or to set aside arrangements by which stock has been issued as fully paid for a consideration less than its par value.—No reason exists why a creditor may not waive his right to proceed against stockholders to any extent he pleases, and such waiver may be either express or implied. If the creditor stipulates, at the time the debt is contracted, not to look to the stockholders for payment,

or if he expressly consents to arrangements by which the stockholder is to be discharged on payment of less than par, he will be bound accordingly. *Slee v. Bloom*, 19 Johns. 456; *Robinson v. Bidwell*, 23 Cal. 379; 2 Mor. Corp., § 829; 1 Beach Priv. Corp., § 119; *Cook Stock & Stockh.*, § 216. If the creditor at the time of contracting with the corporation has notice or knowledge of arrangements between the corporation and its stockholders by which they are to be released on paying a percentage only of the par value of the stock, or by which they receive full-paid stock in exchange for property or services, he will be deemed to consent to such arrangements, and cannot afterward object thereto or set them aside. *Elyton Land Co. v. Birmingham Warehouse Co.*, post; *Osgood v. King*, 42 Iowa, 478; *Walburn v. Chenault*, 43 Kans. 352; 28 Pac. Rep'r, 657; *Young v. Erie Iron Co.*, 65 Mich. 111; *First National Bank v. Gustin-Minerva Mining Co. (Minn.)*, 1 Am. R. R. & Corp. Rep. 272; *Whitehill v. Jacobs*, 75 Wis. 474; S. C., 1 Am. R. R. & Corp. Rep. 165; *Coit v. Gold Amalgamating Co.*, 119 U. S. 343; S. C., 14 Fed. Rep'r, 12; *Fort Madison Bank v. Alden*, 129 U. S. 372.

In *Young v. Erie Iron Co.*, 65 Mich. 111, *Champlin, J.*, says: "Although it is a well-established doctrine, founded upon just principles, that the capital stock of a corporation, and especially its unpaid capital in the hands of subscribers or purchasers from the corporation, is a trust fund for the satisfaction of the debts of an insolvent corporation, yet it is equally well settled that persons dealing with corporations may consent to existing arrangements, and by contracting with them, with notice or knowledge of arrangements which limit the liability of the subscribers to pay the full amount of the capital stock, may expressly or impliedly waive the right to compel the stockholders to contribute the full amount of their subscriptions in discharge of corporate obligations." Page 128.

What will constitute notice is a question considered in *Elyton Land Co. v. Birmingham Warehouse Co.*, post; *Osgood v. King*, 42 Iowa, 478; *Preston v. Cincinnati, etc., R. Co.*, 86 Fed. Rep'r, 54. Where land was conveyed in payment of stock and the deed recorded, it was held that a recital in the deed that its consideration was a specified amount of stock in the corporation, was not notice to one contending with the company. *Osgood v. King*, 42 Iowa, 478.

10. *General observations.*— If no question of positive law or public policy is involved in the matter of the disposition of stock by a corporation, then the question of the liability of the stockholder is to be worked out upon the general principles of law and equity. The cases controlled by some positive law, that is, by some statutory or constitutional provision, may be left out of view. Some of the cases above cited go far toward holding that there is a *public policy* which forbids a transaction whereby stock is issued as fully paid for a consideration less than its par value, or so much less as to partake of fraud, although both the corporation and the stockholder may be fully cognizant of all the facts. If there is such a public policy, then it is manifest that a creditor may take advantage of it to impeach the transaction, without reference to the question of how the transaction has affected him. If there is no such public policy, then he can only impeach the transaction through the corporation or by virtue of his own equities in the case. The cases in which the transaction can be impeached through the corporation, that is, in which the corporation might maintain a suit to set it aside, need not be considered in this connection.

If the creditor stands simply upon his equities, that is, upon the equitable rule that the capital stock, and especially unpaid subscriptions to stock, are a trust fund for creditors, and that this fund cannot be impaired or diverted to the prejudice of the creditors by any arrangements between the corporation and stockholder, then where the reason of the rule fails, the rule itself must cease to apply. This view is aptly put by Love, J., who heard the case of *Clark v. Bever*, in the lower court. He says:

"What are the grounds and reasons of the doctrine that a stockholder cannot by contract with the corporation, be exempt from the full payment of his stock? The sole reason and basis of the principle is that the capital stock, in common with the other property of the corporation, is a trust fund primarily for the satisfaction of its debts, and subject to the rights of creditors for the benefit of shareholders. Now suppose it could be shown, in any given case, that an issue of stock by the company, with the right to the stockholder of partial payment, would prove a benefit rather than an injury to both creditors and shareholders, what reason would there be to apply the principle in question to such a case? Of course, the burden of showing the beneficial character of such a transaction to creditors and shareholders would rest upon the holder of the stock. Suppose a creditor of an insolvent corporation should see fit, for any reason satisfactory to himself, to receive the worthless stock of the corporation as paid-up stock, at twenty cents on the dollar, in full satisfaction of his debt, what possible injury could accrue to other creditors and stockholders? Would such a transaction not form an absolute benefit to them? In the first place, such stock, in the possession of the company unissued, would be of no value whatever to creditors. It would produce nothing, and pay nothing. It would seem, therefore, that the payment of a debt by the issue of such worthless stock would be no possible injury to other creditors. On the contrary, it would seem to be a positive advantage to the other creditors to have a particular debt discharged by stock of no value, because the creditor so receiving the stock would have no right to claim *pro rata* payment out of the assets of the insolvent corporation. As to the stockholders of the corporation how would they be injured by such a transaction? The corporation being insolvent, and its assets, including, of course, the capital stock, fully paid up, being insufficient to pay the debts, there would be nothing left for the stockholders. Their stock would be worthless. It could not be made less valuable by the payment of a particular debt with newly-issued stock. They would not be affected, one way or the other, by the transaction, since they would be compelled to pay their stock up fully for the benefit of creditors, and nothing more could in any event, be required of them." *Clark v. Bever*, 31 Fed. Rep'r, 670, 674.

Had the railroad company in question in this case succeeded in getting upon its feet, following the arrangement with the construction company, and after a period of prosperity had again become embarrassed, and a new set of creditors had arisen subsequent to that transaction, and they had sought to charge the same defendants upon the same stock, then a different case would have been presented. It would seem that such new creditors would have been entitled to rely upon the assumption that the stock in question had been or would be paid for in money or money's worth.

On the same principle it would seem to us that the case of *Van Cott v. Van*

Brunt, 83 N. Y. 535, can only be justified on the basis that the debts in question were contracted before the transaction was had.

In *Colt v. Gold Amalgamating Co.*, 119 U. S. 343, where the stock of a corporation was increased from \$100,000 to \$1,000,000 and \$200,000 issued to a new stockholder for property contributed by him, \$400,000 to the holders of the old stock and \$400,000 retained by the company, and the stock was afterward reduced to \$100,000 and the new stock surrendered and canceled, it was held that existing creditors, not having been in any way prejudiced by the issue and subsequent cancellation of the new stock, could not compel the holders thereof to pay any part of the par value thereof, but the court says: "Had a new indebtedness been created by the company after the issue of the stock, and before its recall, a different question would have arisen. The creditor in that case, relying on the faith of the stock being fully paid, might have insisted upon its full payment." Page 347.

The case of *Handley v. Stutz*, preceding this note, in so far as it holds that the purchasers from the corporation of new stock at a price below par, would not be liable for the balance of the par value of the shares to subsequent creditors who trusted the corporation on their faith that the new stock had been or would be paid in full, would seem to be inconsistent with the recognized and well-established principles relating to the liability of stockholders to creditors, with the general current of authority and even with other parts of the same decision. We refer especially to paragraph 6 of the opinion. It is to be noted that two of the justices dissent from the decision of the court upon this point. See further, *Elyton Land Co. v. Birmingham Warehouse, etc., Co.*, post.

BUSHNELL V. CONSOLIDATED ICE-MACHINE CO. ET AL.

(Supreme Court of Illinois, May 13, 1891.)

1. CORPORATIONS. DEFECTIVE ORGANIZATION. IMPEACHING SUBSCRIPTIONS TO STOCK. One cannot in a court of equity, for the purpose of having a corporation declared a partnership, raise the point that subscriptions to the stock made by him were not made in good faith.

2. PARTNERSHIP LIABILITY. DE FACTO CORPORATIONS. Under the provisions of the Revised Statutes of Illinois, chapter 33, that the certificate of complete organization shall after its issue by the secretary of state be filed in the office of the recorder of deeds in the county where the company has its principal office, and that then the corporation shall be deemed fully organized, even if corporate existence *de jure* depends on such filing, still, having taken all other necessary steps, and elected officers, and carried on business for several years, it would be a *de facto* corporation, and one who took part in its organization, and was elected and acted as its secretary and general agent, cannot treat it as a partnership, and compel his fellow-corporators to account to him on that basis.

ERROR to circuit court, Cook county.

F. P. Read (*J. N. Jewett* of counsel) for plaintiff in error.
Tatham & Webster for defendants in error.

WILKIN, J. This was a proceeding in chancery by plaintiff in error against defendants in error, begun in the circuit court of Cook county on the 27th day of October, A. D. 1889, the object of which was to have the "Consolidated Ice-Machine Company" declared a copartnership, and its affairs settled between the complainant and defendant accordingly. In the circuit court a general demurrer was sustained to the bill, and a decree entered dismissing the same at complainant's cost. From that decree this writ of error is prosecuted.

The following facts affirmatively appear from the bill: Early in September in 1834 complainants and the defendants Skinkle, Rassieur and Koenigsberg, together with one Edmund Jungefelf, since deceased, entered into an agreement in writing to form a corporation to be known as the "Consolidated Ice-Machine Co.," under the laws of this state; that all the required steps up to and including the issuing of a certificate of the complete organization of such corporation by the secretary of state, as required by section 4, chapter 32, Revised Statutes, were taken; that in pursuance of that certificate complainant, with said Skinkle, Rassieur and Jungefelf, claiming to be the directors of said company, elected officers for the same, "and immediately engaged in business." It also appears from the bill that said company continued to do business under said name to the filing of this bill, a period of more than five years. Also, that for several months complainant continued to be the secretary and soliciting agent for the same, and was actively engaged in its business; that about January 1, 1885, he became afflicted with melancholia, and remained incapacitated for the transaction of business for about three years; that during his said sickness the other directors of said company sold certain shares of his stock in said company for a failure on his part to pay installments due thereon, the sale being made without notice, etc., and that since said sale he has been excluded from all participation in the management of said business; that, after being restored to health, and before filing his bill, he made frequent

demands to be restored to his rights in said corporation without avail, etc. Facts are then alleged which go to the basis of a settlement between the parties upon the theory that they are liable to each other as partners. In our view of the case these facts are unimportant.

It is also insisted in the argument that the bill shows that by the terms of the agreement to organize said company the same was only to exist for a period of five years, which had expired when the bill was filed. The license under which the organization was made is attached to the bill as an exhibit, and it states that its duration shall be twenty-five years. If it were important to determine the life-time of the company, we have no doubt this license, and not the preliminary agreement of parties, would control. That, however, is not a question of importance in this proceeding. For the mere exercise of its franchise beyond the period for which it was organized the state alone could complain. It is also contended that certain subscriptions to the capital stock, made by complainant, are shown by the bill not to be subscriptions made in good faith, and that the directors, having assumed corporate power before all the stock was subscribed for in good faith, became personally liable for all debts and liabilities of the company under section 18, chapter 32, Revised Statutes. We think it clear that complainant is in no position to raise that question in a court of equity for the purpose of having the company declared a copartnership. The only allegation of the bill which is seriously insisted upon as furnishing a ground for the relief prayed is "that the certificate of complete organization was never recorded in the office of the recorder of deeds for Cook county, where its principal office is located;" the argument being that, in order to constitute the defendant company a corporation under the laws of this state, that certificate must have been so recorded, and, failing to become incorporated, its members are to be treated as partners. The section of the statute upon which the first proposition is based is as follows: "The secretary of state shall thereupon issue a certificate of the complete organization of the corporation, making part thereof a copy of all papers filed in his office in and about the organization of the corporation, and duly authenticated under his hand and seal of state, and the same shall be recorded in a book for that purpose in the office of the

recorder of deeds of the county where the principal office of such company is located. Upon the recording of said copy the corporation shall be deemed fully organized, and may proceed to business. Unless such company shall be organized and shall proceed to business as provided in this act within two years after the date of such license, then such license shall be deemed revoked, and all proceedings thereunder void." The language of this section is not clear. While it says the certificate shall be recorded, it does not say who shall cause it to be done. It does not say the recording of the certificate shall be necessary to the complete organization of a corporation, but "upon the recording of the said copy the corporation shall be deemed fully organized, and may proceed to business." Conceding, however, by the word "copy" is meant "certificate," incorporators would have done all that is required of them when they had filed it with the proper officer for record. There is no allegation in this bill that it was not so filed. The averment is simply that it has "never been recorded," etc. But, assuming that a corporate existence *de jure* depends upon the filing of the certificate of complete organization in the office of the recorder of deeds of the county in which its principal office is located, and that the bill properly avers that it was not done in the case of the corporation in question, it by no means follows that it did not become a corporation *de facto*, as between the complainant and defendants. From the facts set up in the bill it clearly appears that there was an honest attempt by the incorporators to organize a corporation authorized by the laws of this state.

The necessary steps to perfect that organization were all taken as required by the statute, except that the final certificate was not recorded. It is shown by the bill that upon the issuing of that certificate its directors elected the proper officers, and proceeded to the transaction of business as a corporation and continued to act as such until the filing of this bill — a period of more than five years. That these facts established a corporation *de facto* is settled by numerous decisions of this court. *President, etc., v. Thompson*, 20 Ill. 198; *Rice v. Railroad Co.*, 21 Ill. 93; *Baker v. Administrator, etc.*, 32 Ill. 79; *Ramsey v. Insurance Co.*, 55 Ill. 311; *Cincinnati, L. F. & C. R. Co. v. Danville & V. R. Co.*, 75 Ill. 113; *Railway Co. v. Shires*, 108 Ill. 617; *Hudson v.*

Seminary, 118 Ill. 618. That plaintiff in error, if he had been sued by the "Consolidated Ice-Machine Company" on his subscription to its capital stock, could not have questioned its corporate existence on the grounds alleged in his bill, is directly settled by several of the above-cited decisions. It is equally clear that if during the time he was a member of said corporation it had been sued as such, neither he nor any other of its members could have been heard to say that no such corporation existed. The general rule is that one who deals with a corporation as existing *de facto* is estopped to deny as against it that it has been legally organized. It is the settled rule in this state that the legal existence of a corporation *de facto* cannot be questioned collaterally. See cases, *supra*, and *Renwick v. Hall*, 84 Ill. 162; *People v. Trustees*, 111 Ill. 171; *Keigwin v. Commissioners*, 115 Ill. 347; 5 N. E. Rep'r, 575. It seems impossible to find a reason for placing the complainant in this bill in a more favorable position to deny the existence of the corporation in question than a mere subscriber to its capital stock, or one who as a third party had dealt with it as a corporation, and we are of the opinion that he could not do so in this collateral proceeding.

He, however, not only seeks to question the legal organization of the corporation, but to have the same changed into a copartnership between himself and the other incorporators, and to compel the defendants to account to him as his copartners. "A partnership is never created between parties by implication or operation of law apart from an express or implied intention and agreement to constitute the relation." 1 *Bates Partn.*, § 3. In *Phillips v. Phillips*, 49 Ill. 437, *Caton, C. J.*, said: "A partnership can only exist in pursuance of an express or implied agreement to which the minds of the parties have assented." This rule will not prevent the enforcement of liability against persons as partners when sued by third parties. "Parties may so conduct themselves as to be liable to third persons as partners when in fact no partnership exists as between themselves. The public are authorized to judge from appearances and professions, and are not absolutely bound to know the real facts; while the certain proof is positively known to the alleged parties to a firm." *Phillips v. Phillips*, *supra*. On this latter ground parties who have attempted to organize a corporation, but have failed to comply with the law so

as to perfect their incorporation, may be held liable as partners to creditors, as in *Bigelow v. Gregory*, 73 Ill. 197. This liability rests on the doctrine of estoppel. When, however, even a creditor has dealt with the corporation as such, partnership liability cannot be enforced, even though the corporation has not been legally organized. *Tarbell v. Page*, 24 Ill. 46. It is wholly unnecessary, however, in this case to determine when and under what circumstances third parties may proceed against incorporators acting under a defective or imperfect organization, as individuals or copartners.

In this case the complainant shows by his bill that he was not only one of the incorporators of the company he now seeks to question, but that he was, upon its complete organization, elected its secretary and general agent, and acted as such for several months prior to his alleged disability, during which time he was actively engaged in assisting to carry on its corporate business, and that, upon his being restored to health, he still recognized its corporate existence, and sought to be restored to his rights therein. If the recording of the certificate in question was essential to the organization of the corporation there is nothing in this bill to show that it was not as much his duty to have it done as that of either of the other incorporators. We are unable to perceive then, upon what principle he can now compel those who, for any thing appearing in this bill, honestly supposed they were incorporated, during all the time the business mentioned in the bill was being carried on, to account to him, upon the theory that they were his copartners. In fact, if the allegation as to his mental condition at the time his stock was sold was omitted from the bill, it would strike any one as too clear for argument that he has failed to state a case entitling him to equitable relief; and it must, we think, be held that whether that fact, together with the allegation that his stock was sold without notice, and he ousted from all participation in the business of the company, would entitle him to his action for that alleged wrong, or to be restored to his former rights as a member of said corporation or not, no legal ground is shown by this bill for holding defendants liable to him as partners. There is nothing in the case of *Flagg v. Stowe*, 85 Ill. 166, when the facts of that case are considered as they appear in that report, and in *Stowe v. Flagg*, 72 Ill. 397, contrary to the view here

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expressed. We have examined the numerous cases cited by counsel for plaintiff in error as giving support to the position that a corporation defectively organized may be treated as a copartnership, and the members held liable as partners; but when it is borne in mind that complainant himself was a member of the corporation in question, and in no sense a third party, and that he is not seeking by this bill to recover for any thing which he has been required to pay third parties for or on behalf of said corporation, they have no application. What he seeks to do is to have the corporation converted into a partnership, contrary to the contract of the parties, simply because he and other incorporators failed to perfect, as he says, the corporation. He does not even show that he has been misled, or in any way injured, by the failure to have the certificate of complete organization recorded; neither does he pretend that the omission of any of the incorporators to have the same recorded was willful, or in any way designed to injure him or others. We can find neither authority nor reason to support this bill, and are clearly of the opinion that the decree of the circuit court is right.

Affirmed.*

De facto corporations—liability of stockholders as partners.—The subject of *de facto* corporations is considered at length in note to *Vanneman v. Young*, 8 Am. R. R. & Corp. Rep. 660. As to the liability of stockholders as partners in defectively organized corporations, see page 683 of said note; also *Heald v. Owen*, 1 Am. R. R. & Corp. Rep. 391; *Snider's Sons Co. v. Troy*, ante, p. 25.

CINCINNATI INCLINED PLANE RY. CO. v. CITY & SUBURBAN
TEL. ASS'N.

(Supreme Court of Ohio, June 2, 1891.)

1. **STREET RAILWAYS. ELECTRIC POWER. CONFLICTING RIGHTS OF TELEGRAPH AND RAILWAY COMPANY.** The dominant purpose for which streets in a municipality are dedicated and opened is to facilitate public travel and transportation, and, in that view, new and improved modes of conveyance by street railways are by law authorized to be constructed, and a franchise granted to a telephone company of constructing and operating its lines along and upon such streets is subordinate to the rights of the public in the streets for the purpose of travel and transportation.

* Reported in 27 N. E. Rep'r, 596.

2. PRIOR GRANT TO TELEGRAPH COMPANY TO USE STREET IS SUBJECT TO RIGHT TO ESTABLISH AND OPERATE AN ELECTRIC RAILWAY THEREON. The fact that a telephone company acquired and entered upon the exercise of a franchise to erect and maintain its telephone poles and wires upon the streets of a city prior to the operation of an electric railway thereon, will not give the telephone company, in the use of the streets, a right paramount to the easement of the public to adopt and use the best and most approved mode of travel thereon; and, if the operation of the street railway by electricity as the motive power tends to disturb the working of the telephone system, the remedy of the telephone company will be to readjust its methods to meet the condition created by the introduction of electro-motive power upon the street railway.

3. TELEGRAPH COMPANY'S CLAIM TO "GROUND CIRCUIT" NOT SUPERIOR THOUGH PRIOR. RELATIVE RIGHTS OF THE TWO COMPANIES GENERALLY. Where a telephone company under authority derived from the statute, places its poles and wires in the streets of a municipality, and, in order to make a complete electric circuit, for the transmission of telephonic messages, uses the earth, or what is known as the "ground circuit," for a return current of electricity, and where an electric street railway, afterward constructed upon the same streets, is operated with the "single trolley overhead system," so called, of which the ground circuit is a constituent part, if the use of the ground circuit in the operation of the street railway interferes with telephone communication, the telephone company, as against the street railway, will not have a vested interest and exclusive right in and to the use of the ground circuit as a part of the telephone system.

ERROR to the superior court of Cincinnati. The original action was commenced in the superior court of Cincinnati by the City and Suburban Telegraph Association, defendant in error, against the Cincinnati Inclined Plane Railway Company, plaintiff in error. The petition filed was as follows:

"The plaintiff says that it is an association incorporated under the laws of Ohio, for the purpose of constructing, maintaining and operating telegraph and telephone lines in said state and elsewhere, and has its principal office and business in the city of Cincinnati, where it is now, and has for more than ten years past been, conducting a telephone business, by means of wires stretched upon poles lawfully placed and maintained in the streets pursuant to the statutes made for that purpose, and under the direction of the authorities of said city. Said wires are connected with and terminate at the several 'exchanges' owned by the plaintiff in said city and vicinity. At the 'exchanges' the wires are so arranged by means of a device for that purpose, that any one of them can be immediately connected with any other. Each wire also terminates in the office, store-room, place of business or

residence of some person, firm or company, a subscriber to this association, paying an annual sum for the use of the telephone, and the service in connection therewith. Each of such subscribers can, by the use of the telephone and other patented inventions of which the plaintiff is the sole licensee in the territory where it transacts business, immediately communicate with and speak to an operator in an 'exchange,' and said operator can, and if requested does, forthwith connect such subscriber's wire with that of any other subscriber named, so that the two may converse directly with each other. Such communication is effected by means of a slight but continuous electric current passing over the wire from the speaker to the hearer, and unless interrupted or interfered with is easily and quickly made. Plaintiff says that many thousand such communications are daily made between persons in all parts of said city and in the county of Hamilton; that all the principal offices, business houses, newspaper offices, hotels and other places of resort, and many residences in said county, are thus connected together and brought into communication. Plaintiff says that it has over three thousand such subscribers in the city and vicinity, and that its lines also extend to and connect all the villages for many miles around said city, and hundreds of communications are daily made over the last-named lines, for each of which a small sum is paid plaintiff by the person sending the same; that the whole constitutes a business of value to the plaintiff, and important to the public. Plaintiff further says that the defendant is a corporation under the laws of Ohio, engaged in the maintenance and operation of an inclined plane railway in the city of Cincinnati, and claims to own, and is now in possession of, the street railway tracks of what is generally known as the 'Mt. Auburn Street Railway' which, beginning at the corner of Fifth and Walnut streets in said city, extends thence by single track, on Fifth to Main street; thence on Main, by single track to Court street; thence on Main, by double track, to Mulberry street, where it connects with said inclined plane railway, also extending from the north end of said inclined plane railway, by double track on Locust and Mason streets, Auburn avenue and Vine street, to the Carthage turnpike and the Zoological Garden; also on Court street, by single track, from Main to Walnut street, and on Walnut street, by single track, to Fifth street, to

place of beginning. Plaintiff further says that said defendant claims to own and control said tracks by virtue of an assignment or transfer of the same from other parties or companies; but plaintiff is not informed as to said transfers, or the validity thereof, and does not admit that the same, or any of them, are lawful or valid. But plaintiff says that the said tracks were originally constructed by the parties under whom defendant claims, under alleged grants from the city of Cincinnati, which provided that 'no motive power, except horses or mules, shall be used on said tracks,' and the same have never been altered or amended in that respect, and the defendant has never acquired from the state of Ohio, or the city of Cincinnati, any right to erect and maintain poles or wires in the streets aforesaid, or to use electricity as a motive power for its cars.

"Plaintiff further says that since the defendant came into possession of said street railway, it has, within six months last past, and without any lawful authority so to do, caused a line of iron poles to be erected on each side of all the streets where said tracks are situated as aforesaid, and placed upon the said poles large wires which it keeps constantly charged with powerful currents of electricity, generated by large steam engines and dynamos owned and operated by defendant for that purpose, by means whereof the cars upon all parts of the track aforesaid are run and operated from six o'clock in the morning until twelve o'clock at night of each and every day. Plaintiff further says that the defendant claims to have secured authority from the commissioners of Hamilton county to extend tracks along and upon the Carthage turnpike to be operated by electricity, as aforesaid, from the existing tracks to the village of Carthage, and will place thereon poles and wires, and, unless restrained by the order of this court, will proceed to run and operate street-cars thereon in the same manner that it is now running and operating them upon existing tracks. Plaintiff further says that, ever since defendant commenced the operation of its cars by electricity, it has caused, and is still causing, great damage and injury to plaintiff by creating electric currents and noises upon plaintiff's telephone wires, many of which are and have been, for a period long prior to the use of electricity by defendant, located upon each and all the streets aforesaid, and upon the Carthage turnpike. By reason of the proximity of the de-

defendant's poles and wires to those of plaintiff, and of the powerful currents used by defendant, together with its mode of use and manner of construction, currents of electricity are transmitted to, or induced upon, the wires of plaintiff, such as to render them useless for telephonic purposes. The noises produced by defendant's operations are loud and continuous, so as to prevent communication by telephone, and the connection of many of plaintiff's subscribers, with the exchanges and with each other, has been thereby interrupted and broken up, and some of said subscribers have ordered their telephones removed, and canceled subscriptions, while others have only been restrained from so doing by the representations of plaintiff's officers that steps would be taken to induce or compel defendant to remedy the evil. Plaintiff has received, and is receiving, a multitude of complaints from subscribers whose lines are affected by defendant's operation, and numerous notices that, unless the difficulty is remedied, the telephones of the complaining subscribers must be removed. Plaintiff further says that as soon as the defendant began the operation of cars by electricity, and the consequent injury to its (plaintiff's) plant and business defendant was notified thereof, and requested to remedy the same, and has since been repeatedly urged to do so, but up to the present time has failed and refused to apply or attempt to apply any remedy, or take any step to prevent the injury to plaintiff aforesaid, which plaintiff is informed and believes can be done by defendant without any great expenditure of money, and without giving up the use of electricity as a motive power for its cars. Plaintiff asserts that great injury has been caused, and great and irreparable injury will be caused to it by the continued operation of cars by defendant, as it is now, and has been heretofore, operating the same.

The plaintiff's lines and telephones in the vicinity of said street railway will be rendered useless, the revenue received from the subscribers thereof cut off, and the business of the company greatly reduced. Wherefore the plaintiff prays that defendant be temporarily enjoined from constructing and operating an electric railway on the Carthage turnpike, of the sort that it is now using, or of any sort that will interfere with or injure plaintiff's lines or business; that, on final hearing, said injunction be made perpetual, and the defendant further restrained from operating any of its

cars by means of electricity, in the manner it is now operating the same, or in any manner that may interfere with or injure plaintiff's business. That the damages already suffered by the plaintiff be assessed and ordered paid by defendant, and for such other and further relief as the nature of the case and equity may require."

To this petition the defendant filed an answer, in which, among its averments and denials, the defendant denies that the plaintiff is an association incorporated under the laws of the state of Ohio, for the purpose of constructing, maintaining and operating telephone lines in said state; and denies that the plaintiff's telephone poles and telephone wires are lawfully maintained in the streets and highways, pursuant to the statutes made for that purpose, or under the direction of the authorities of the city of Cincinnati; and alleges that the plaintiff exercises the powers of a telephone company, and maintains its poles and wires without any lawful authority whatever. The answer avers that, under and by reason of the ordinances, grants, laws, leases and resolutions therein mentioned, it rightfully and lawfully maintains, controls and operates, by the electric system known as the "Sprague single trolley overhead system," all its lines of road described in the plaintiff's petition. The defendant, answering, says that it is not liable to the plaintiff in any form of action, whether in law or equity, for the alleged interferences and disturbances, as set forth in the petition; and denies that there is any thing in any of the laws of this state, or in any pretended grant to the plaintiff, which gives to the plaintiff the right to use the earth at all, much less the exclusive right to use the earth, for its return circuit. On the contrary, the defendant denies that the authorities which made any pretended grant to the plaintiff knew that the plaintiff intended to use the earth at all for its return circuit, or would so construct its line; and further denies the claim set up by the petition to the exclusive use of the earth by the plaintiff, because of the vagueness of said claim. The defendant, further answering, says that the plaintiff, if undisturbed by the electrical current from the dynamos of the defendant, will be compelled to resort to other than a grounded circuit in order to give efficient service to its patrons; that the uniform and slight current which the plaintiff claims to be necessary to the successful operation of the telephone cannot be obtained by the use of the grounded cir-

cuit, but may be obtained by constructing the telephone either with a complete metallic circuit, or by resort to what is known as the McCluer device; that whereas, instead of being injured by abandoning the ground circuit and resorting to the metallic circuit, or the McCluer device, the plaintiff will be actually benefited in its service to its patrons, while the defendant cannot abandon its use of the ground circuit without injury to its railroad and to its patrons; that the defendant could not alter its plan of electrical propulsion so as to have a metallic circuit; that such a change is impracticable, would involve a very large outlay, necessitate an overhead structure of double or treble the cost of that now used, and very unsightly, and after it is constructed it would not be successful; that such a system has been tried, and found to be a financial and commercial failure, and in its effect as annoying and disturbing as the Sprague system, under which the defendant is now operating. The defendant, further answering, denies that the noises produced by its operations are loud and continuous, so as to prevent communication by telephone, and that the connection of many of the plaintiff's subscribers with the exchange and with each other has been thereby interrupted and broken up. It denies that the plaintiff has received and is receiving a multitude of complaints from subscribers whose lines are affected by defendant's operations, and also numerous notices that, unless the difficulty is remedied, the telephones of the complaining subscribers must be removed. It denies that great injury has been caused, and great and irreparable injury will be caused, to the plaintiff by the continued operation of cars by defendant, as it is now and has been heretofore operating the same. It denies that the plaintiff's lines and telephones in the vicinity of said street railway will be rendered useless, the revenue received from the subscribers therefor cut off, and the business of the plaintiff greatly reduced.

The plaintiff for reply denied each and every allegation contained in the answer, except such as admitted allegations of the petition.

The action came on to be heard at a special term of the court held in February, 1890, and neither party demanding a jury, the cause was heard and tried by the court upon the pleadings and evidence; and thereupon the court made a finding of facts, and stated its conclusions of law upon the facts so found, and rendered

a judgment and decree thereon in favor of the telegraph association against the railway company, as follows: "This cause coming on to be heard upon the pleadings and the evidence, and having been fully argued by counsel and submitted to the court without intervention of a jury, the court, upon consideration thereof, finds that plaintiff lawfully maintains telephone lines upon the streets named in the petition, and upon the Carthage turnpike, and has so maintained the same ever since a long time prior to the introduction of the electro-motive power upon the street railway of defendant, and that said telephone lines are maintained and operated in the manner set forth in the petition; that defendant began the operation of cars by means of electro-motive power upon the street railway on the — day of June, 1889; and by reason thereof, and especially of the manner in which the electric current is permitted to pass from the wheels of defendant's cars into the rails and thence into the earth, great injury has been and continues to be inflicted upon the plaintiff in the manner described in the petition, and that great and irreparable injury will be inflicted upon the plaintiff by the continued operation of defendant's cars, in the manner in which they are now operated and will continue to be operated, unless restrained by the order of this court, and that plaintiff has no adequate remedy at law for said injury. The court further finds that there is a mode of operating street-cars by electro-motive power, by means of the double trolley, available to the defendant, the use of which will avoid and prevent the injury to the plaintiff above mentioned. As matter of law the court concludes that defendant is bound to adopt some mode of propelling its cars, other than the one which inflicts the said injury upon the plaintiff, to which finding and decision of the court the defendant excepted at the time the same was made, and moved the court to set the same aside and grant a new trial: (1) Because the finding and decision of the court is not sustained by sufficient evidence, but is against the weight of the same; (2) because the finding and decision of the court is contrary to law. Which said motion the court overruled, to which ruling the defendant, at the time the same was made, excepted, and presented to the court its bill of exceptions herein (embodying all the testimony, evidence and exhibits offered by either party upon the trial of the action), which, being found by the court to be true, is al-

lowed and signed, and on motion is hereby made part of the record of the case; and thereupon the court orders, adjudges and decrees that the said defendant company be, and it is hereby, perpetually restrained and enjoined from operating any car or cars upon the street-railway tracks mentioned in the petition, or any of them, or upon any tracks laid or to be laid upon the Carthage turnpike, by means of electric currents passing from a wheel or wheels of such car or cars into the rails of such track, or any of them, or by means of electric currents, the whole or any part of which may be knowingly permitted to pass into the earth, or for which the earth constitutes any part of the conducting medium, in such manner as to cause injury to the plaintiff, to all of which defendant excepts. It is further ordered that the operation of this decree be, and it is hereby, stayed for the period of six months from date hereof, with liberty upon the part of the defendant to apply for an extension of said time."

The court appointed a special master, with directions that he ascertain and report the amount of damages, in money, theretofore sustained by the telegraph association, and hear evidence for that purpose, and report to the court. Upon petition in error, the superior court, at general term, affirmed the judgment and decree of the court at special term. By the present proceeding in error this court is asked by the railway company to reverse the judgment of the superior court at general term, and to render such judgment as the court below should have rendered. Further facts disclosed by the record, and undisputed, are stated in the opinion.

John S. Wise, E. A. Ferguson and R. A. Harrison for plaintiff in error. *Aaron F. Perry, Peck & Shaffer and Selwyn N. Owen* for defendant in error.

DICKMAN, J. (after stating the facts as above). The Cincinnati Inclined Plane Railway Company was incorporated in the year 1871, under the act of May 1, 1852, entitled "An act to provide for the creation and regulation of incorporated companies in the state of Ohio." On March 30, 1877, the legislature passed an act authorizing any inclined plane railway or railroad company, theretofore or thereafter organized under the act of 1852, to hold, lease or purchase and maintain and operate, such portion of any street railroad leading to or connected with the inclined plane as

might be necessary for the convenient dispatch of its business, upon the same terms and conditions on which it held, maintained and operated its inclined plane; "provided, that no other motive power than animals shall be used on the public highways occupied by such street-railway company without the consent of the board of public works in any city having such board, and the common council, or the public authority or company having charge or owning any other highway in which such street railroad may be laid."

In September, 1885, the Cincinnati board of public works adopted a resolution, consenting "to the use either of electricity, cable or compressed air, as a motive power, by the Cincinnati Inclined Plane Railway Company upon the highways in which the street railroads, connected with its inclined plane, and held and operated by it, are laid." In October, 1888, the railway company, setting forth the resolution giving such consent, and stating that it had decided to use electricity as a motive power on its road, made application to the board of public affairs — the legally-constituted successor of the board of public works — for permission to erect, along the entire length of its road, the poles, wires and other appliances necessary to operate and maintain its entire line from Fifth and Walnut streets to the Zoological Garden, as an electric road. And thereupon the board of public affairs, acting under authority of the act of March 30, 1877, and in furtherance of the grant made by the board of public works, granted the application of the railway company, upon the following condition: "(1) The poles to be made of iron of the size and pattern, and the wires to be strung in the manner as shown on the plan submitted to this board and hereby approved." In February, 1889, in accordance with the provisions of section 3306 of the Revised Statutes, the stockholders of the railway company extended the northern terminus of its road at the Zoological Garden to the village of Glendale. And in March, 1889, the board of county commissioners of Hamilton county, by resolution, granted the application of the railway company to use and occupy the Carthage turnpike to its northern terminus, by double tracks, and with necessary appendages and appurtenances of an overhead electric railroad system, so as to enable the company to permit continuous, rapid and safe transportation between Fountain square, in Cincinnati, and the village of Carthage. A provision in the grant

provided for the removal by the county commissioners, of any and all telegraph and telephone poles which might interfere with the operation of the electric road. This provision, however, was afterward modified by the action of the commissioners, so as to locate the telegraph and telephone poles at the curb line.

The plan submitted to and approved by the board of public affairs is known as the "Sprague single trolley overhead system." Under the supervision of the engineer of the board, the poles were erected and wires strung; and about the beginning of June, 1889, the railway company had put its street railway in operation under that system, as far as the Zoological Garden; and at the commencement of the original action was engaged in constructing its extension along the Carthage pike, under the grant of the county commissioners, with the necessary appendages and appurtenances of the single trolley system. In the Sprague system, the electricity used to operate the motors under the cars is conveyed to them by a single overhead trolley wire, and a single arm or pole attached to the car, and carrying a contact wheel which runs along and passes up underneath the trolley wire. The current passes down the pole or arm to the switch apparatus on board the car, through the motors, thence to the wheels, and to the tracks. It then passes back to the station along the iron rails of the track, interlaced together by conducting wires, and finally connected by a conducting wire with the negative pole of the dynamo, the greater portion of the current flowing along this line of the track as the return current. Some portions of such current, however, are unavoidably diverted through whatever conductors are in proximity, and which themselves have grounded circuits, but generally returning to the source in which it originated, by means of the metallic ground connection of the rails as extended by the wire to the dynamo. The single trolley system is in use on nine-tenths of the railroads in the United States using electricity. As compared with the double trolley method it is deemed more simple, less liable to disarrangement, much cheaper, and not liable to accidents which would blockade the cars. It has proved successful, and its general adoption, with full knowledge of the double trolley method, furnishes strong proof that it is the most approved system. And, in the finding of facts by the court at general term, there is nothing in disparagement of the single trolley system in

itself, but it is held objectionable because it includes the grounded circuit, which the defendant in error has adopted, and claims a monopoly of its use as against the railway company, as an essential part of its telephonic system. It is evident, therefore, that the railway company derived from the legislature the right to use on its road other motive power than animals; that it acquired the franchise of using electro-motive power; and, eliminating from view the telegraph association, it is making lawful use of such franchise, in a manner authorized by the statute.

The City and Suburban Telegraph Association was incorporated July 1, 1873, as a telegraph company, with lines extending from Cincinnati to Hamilton, in Butler county, under laws since embodied in the chapter of the Revised Statutes regulating "Magnetic Telegraph Companies," and containing section 3454, which provides: "A magnetic telegraph company, heretofore or hereafter created, may construct telegraph lines, from point to point, along and upon any public road, by the erection of the necessary fixtures, including posts, piers and abutments necessary for the wires; but the same shall not incommode the public in the use of such road." In 1878, the telegraph association became the licensee of the American Bell Telephone Company, with the exclusive right to use all its patents in Cincinnati and certain territory adjacent thereto, and, although organized as a telegraph company, entered upon the business of a telephone company. After obtaining the license to use the telephone, the telegraph association erected poles and wires upon the streets wherein the railway of the plaintiff in error is situated, and which was then being operated as a horse railway. These poles and wires were mainly erected in the years 1881 and 1882. But prior thereto, in 1880, the following section was added to the telegraph law: "Section 3471. The provisions of this chapter shall apply also to any company organized to construct any line or lines of telephone; and every such company shall have the same powers, and be subject to the same restrictions, as are herein prescribed for magnetic telegraph companies. But, without this section making the provisions of the chapter relating to telegraph companies expressly applicable to telephone companies, we think that the term "telegraph," as a mode of transmitting messages or other communications, is sufficiently comprehensive to embrace the telephone. It

is thus apparent that, while the telegraph association was organized after the incorporation of the railway company, it had planted its poles, and strung its wires, and entered upon the business of a telephone company before the railway company had put its street railway into operation with electricity as the motive power; that permission in due form of law, was granted to the telegraph association to place and maintain its poles and wires for the purpose of supplying telephonic communication to its subscribers in Cincinnati and vicinity, and also as a means of communication for its longer lines.

But it is urged that the franchise of the telegraph association to construct lines of telephone is greatly impaired by reason of the single trolley railway using a grounded circuit, whereby a large part of the electric current flows off from the rails to the surrounding earth, and to and upon all telephone wires which may be connected with the earth in proximity to the railway. The action is described as "conduction," causing more or less of electric current to be poured into the earth, and into all electric conductors connected with the earth, thereby reaching telephone wires in a grounded circuit, and creating loud and continuous noises upon the wires, which disturb telephonic communication. This disturbance, however, results not solely from the earth circuit of the railway company, but also from the fact that the defendant in error likewise relies upon the earth for its return circuit, by connecting with the earth the end of its wire furthest from its electric batteries. The telephone wires are carried from the phones of subscribers to the gas-pipes in the rooms where the phones are located, or to water-pipes, or to the earth, in order to make a complete circuit. The interference, moreover, with the operation of the telephone, is said to be largely attributable to the delicate mechanism of the telephone wires and phones. The wires being designed to carry the extremely small current needed for telephone transmission, are too small in size to carry successfully the strong current passing into them from electric railways. It is claimed that in addition to this conduction or leakage disturbance, the single trolley electric railway introduces serious disturbances on telephone lines by induction, for the reason that such electric railways employ large wires to convey the current used for the propulsion of their cars, and this current is constantly and rapidly

changing its strength; that these rapidly changing currents in the electric railway wires induce disturbing currents in parallel telephone wires near which the electric railways have been built, and thus prevent a successful transmission of telephonic messages.

These interferences with the telephone service may be obviated it is stated, by the railway company giving up the single trolley system with the ground circuit, and substituting the double trolley system with its two trolley wires, two trolley wheels and electric current passing from one wire through one trolley, through the motor, back through the other trolley to the other wire, and so back to the generator, without escaping to the earth. The grounded circuit, it is insisted, should be abandoned and surrendered to the sole use and service of the defendant in error. But it is admitted that other remedies of the telephone disturbances may be easily obtained by constructing the telephone with a complete metallic circuit, or by resort to what is known as the "McCluer device," consisting of a single return wire, to which a number of telephone wires are attached.

Conceding that the mode adopted by the railway company of propelling its cars by electricity is an interruption to the telephone service of the defendant in error, and calculated to impair its franchise in the manner contended, the inquiry is suggested whether the railway company must yield up a useful franchise, that the same may be exclusively enjoyed by the telegraph association, or whether the association shall adapt its system to existing conditions; whether the company shall change from the single to the double trolley system, from the grounded to the metallic circuit, or whether the association shall use either a complete metallic circuit, or resort to the McCluer device. It is immaterial on which party the expense of the change may fall the more heavily. It is a question of legal right, and as remarked by Lord Hatherley, L. C., in *Attorney-General v. Colney Hatch Lunatic Asylum*, L. R., 4 Ch. 153, "the simplest course, as far as regards the administration of justice, is to ascertain the exact state of the law which regulates the relations of the parties; and, having done so, to proceed to act on it, without any reference to the difficulties of the case on the part of those against whom it is obliged to decide, leaving those parties to relieve themselves as they best can from the position in which they have placed themselves, and, if there

be no other mode of escape, to cease to do the acts which occasion the wrong."

When the telegraph association erected its poles and lines in 1881 and 1882, with the design of conducting the business of a telephone company, it found the railway company operating its street railway, with authority under the statute to use other motive power than animals, to wit, electricity, cable or compressed air, upon obtaining the consent of the board of public works. The telephone business was not among the probabilities when the streets of Cincinnati, now made use of by the telegraph association, were dedicated or condemned for the public use. The primary and dominant purpose of their establishment was to facilitate travel and transportation; they belong from side to side and end to end to the public, that the public may enjoy the right of traveling and transporting their goods over them. The telephone poles and wires, and other appliances, are not among the original and primary objects for which streets are opened, for they may be placed elsewhere than on the highways, and yet accomplish their purpose. In *Taggart v. Railway Co.*, 16 R. I. 668; 19 Atl. Rep'r, 326, it was said by Durfee, C. J., that telephone poles and wires are not used to facilitate the use of the streets for travel and transportation, "whereas, the poles and wires of the railway company are directly ancillary to the uses of the streets as such, in that they communicate the power by which the street-cars are propelled." As a general rule, an occupation of the streets, otherwise than for travel and transportation, is presumptively inferior and subservient to the dominant easement of the public for highway purposes, for, if not so, the primary object of their dedication or appropriation might be largely defeated; and the fact that permission is granted to occupy the streets or highways for a purpose other than travel does not confer a prior and paramount right to occupy them, to the exclusion of their use for travel in a mode different from what obtained when such permission was given. The main purpose of streets or highways being to facilitate travel and transportation, new and improved agencies for effecting that purpose must be presumed to have been in contemplation, in addition to those in existence when the ways were established. To those improved agencies, devised for the convenience and advantage of the community in general, the fran-

chise of the telephone company to occupy the streets for carrying on its business, must be secondary and subordinate. "The use of a highway for the purposes of a street railroad involves the application of new appliances and modes of travel, rather than of any new principle. In both, a corporation is employed and invested with rights in the highway; in both, an expenditure of money is required to put the road in a condition for use and to keep it in repair; but in both, the great leading object and public benefit is the accommodation of travelers, who may have occasion to use them at fixed tolls or rates of fare, and not the profit of the proprietors." *Ranney, J., in Railway Co. v. Cummins-ville*, 14 Ohio St. 523, 545.

In the case of *Hudson River Tel. Co. v. Watervliet T. & R. Co.*, 121 N. Y. 397; 24 N. E. Rep'r, 882, the right of the telephone company to enjoin the railroad company from operating its road by electricity, under the single trolley system, incidentally came under consideration. In delivering the opinion of the court, *Andrews, J.*, after stating that the use of a grounded circuit is not necessary to a telephone system, and that the substitution of the metallic for the earth circuit, besides obviating the disturbance caused by the defendant's road, would promote the general efficiency of the telephone service, says: "The plaintiff is but one of a large number of telephone companies which, under the general permission of the statute for the incorporation of telegraph companies, have erected poles and strung their wires in the streets of the cities and villages of the state. The claim that under this permissive grant they can exclude the use of the streets by electric railways, or for other street purposes requiring the use of electricity, wherever the use of this agent interferes with the use of the telephone, although the municipality may consent and the public interest will be promoted by the other uses to which the streets are sought to be subjected, needs but to be stated to induce hesitation." In the last-entitled case, the telephone company erected poles for its wires, and perfected its system of telephone communication, several years before the railroad company substituted electricity in place of horse-power for the movement of its cars. The authority given by statute to a telephone company to construct its lines from point to point, along and upon any public road, under the continuing prohibition that "the same shall not

incommodate the public in the use of such road," would plainly indicate an intention on the part of the legislature that the company shall exercise such franchise, with reference to the comfort and convenience of the traveling public, and shall not, in any manner, abridge or impair the use, by the public, of the most approved methods of travel and transportation. And a reasonable interpretation of the statute would lead to the conclusion that to impair the public enjoyment of an approved method of conveyance on the streets would be in derogation of the statutory prohibition that the public shall not be incommoded in the use of the roads or highways. The statutory permission to the telegraph association to construct its telephone lines along and upon the highways was not, therefore, without qualification. But, whether the legislature had or had not imposed the condition that the public should not be incommoded, the association, in our judgment, acquired its privilege or promissory grant, subject to the duty of so changing and adjusting, when necessary, its system of operating its telephone lines, as not to curtail the enjoyment by the public of the best modes of travel and transportation upon the streets. Whether all who go on the streets shall have the most convenient and expeditious passage and carriage of person and goods has not been made dependent upon the manner in which the defendant in error has preferred to locate its poles, stretch its telephone wires, or form the electric circuit.

It is in recognition and maintenance of the superior easement of the public in the streets that city councils are required to "cause the same to be kept open and in repair, and free from nuisance;" that the streets are graded and paved, and proper regulations of police provided to govern the actions of persons using them; that the abutting owner, though having a peculiar interest and easement in the adjacent street, appendant to his lot, has no right to place permanent obstructions in the street, nor do any act on his own land, outside the limits of the street, that will make the way inconvenient or hazardous, or less secure than it was left by the municipal authorities. *Crawford v. Delaware*, 7 Ohio St. 459; *Elliott Roads & S.* 311; *Mallory v. Griffey*, 85 Penn. St. 275; *Milburn v. Fowler*, 27 Hun, 568; *Dill. Mun. Corp.*, § 1032, and cases there cited. In *King v. Russell*, 6 East, 427, the right of the owner to load and unload his wagons in the

highway before his warehouse, was held to be entirely subordinate to the right of public passage, and must not be exercised in such a manner as unreasonably to abridge or incommode the latter right. The court say: "The primary object of the street was for the free passage of the public, and any thing which impeded that free passage, without necessity, was a nuisance. If the nature of the defendant's business were such as to require the loading and unloading of so many more of his wagons than could conveniently be contained within his own private premises, he must either enlarge his premises, or remove his business to some more convenient spot." As against the public easement in the highway, a telephone company that obtains the naked permission to locate its poles and wires along the streets should, we think, stand on no higher vantage ground than the owners of property abutting on the streets, who hold or acquire their property subject to all the consequences which may result, advantageously or otherwise, from any public and authorized use of the streets, in any mode promotive of, and consistent with the purposes of, establishing them as common highways.

This paramount easement or estate which the public acquires in the streets, carrying with it a special interest in the adoption of the most approved systems of modern street travel, cannot be made subservient to the telegraph or telephone when admitted on the highway, without the clearest expression of the legislative will. In *Hickok v. Hine*, 23 Ohio St. 523, it was held that, when the legislature has power to require one public easement to yield to another more important — *a fortiori* where the other is inferior — the intention to grant such power must appear by express words, or by necessary implication; and such implication arises only when requisite to the enjoyment of the powers expressly granted, and can be extended no further than such necessity requires. We fail to discover any authority, either express or implied, to subordinate the public easement in the streets to the privileges exercised thereon by the telegraph association, under the general terms of the statute permitting the erection of post, piers and abutments necessary for its telephone wires, and especially when coupled with the condition that the same shall not incommode the public in the use of the highway.

The demand made by the telegraph association is not that the

railway company shall so modify its existing electrical apparatus as not to interfere with the telephone service, but shall forever abandon the use of an essential part of its electro-motive system, or be perpetually enjoined. In other words, the association claims the exclusive use of the grounded circuit, inasmuch as the mechanism of the telephone is so complex, and the electric currents employed so delicate and sensitive, that they cannot be used without disturbance from the heavier currents employed by neighboring electrical enterprises that operate with the grounded circuit. We find no foundation for such an exclusive franchise or right. When the telegraph association began its operation under the telephone system, neither the statute authorizing it to erect and maintain poles, wires and other necessary fixtures, nor the ordinance under which it obtained the power to extend its lines in the streets, gave an exclusive right either to use the earth for a return circuit, or a complete metallic circuit formed by double wires. The legislature did not grant the right by general enactment, nor was the municipal corporation empowered by the legislature to give the telegraph association the exclusive right to make use of its streets so as to create a monopoly. In *State v. Coke Co.*, 18 Ohio St. 262, it was held that a municipal corporation cannot, without clear legislative authority, grant an exclusive right to the use of the streets for certain purposes to an individual or corporation. To enable it to grant such an exclusive right by ordinance in the nature of a contract, the power must be shown to have been expressly granted, or to be so far necessary to the proper execution of the powers which are expressly granted as to make its existence free from doubt.

In the year 1838, Prof. Steinheil made the important discovery of the practicability of using the earth as one-half or the returning section of an electric circuit. Prof. Morse claimed to have made the discovery about the same time, but he failed to obtain a patent therefor. It was the discovery of an elementary principle of science, of a truth in physics, of a law in the operation of the forces of nature, and was not bounded by the trammels of the patent law. For forty years before the telephone was discovered, the use of the earth as a conducting medium, in the formation of an electric circuit, had been the common property of any electric enterprise. By what grant or title, then, did it become the

especial, peculiar and exclusive franchise of the telegraph association? As it did not originate in legislative or municipal grant, so such exclusive franchise did not spring from priority in its exercise. Where a right is common and universal, and capable of being exercised by all at the same time, there is no applicability of the rule that he who in its enjoyment is prior in point of time is prior in right. He who is first in the field does not thereby gain a monopoly of use.

It is contended, however, that the defendant in error, by virtue of its grants, acquired, before the railway company had a right to use electricity as a motive power, a vested interest in the telephone system as it now operates it, with a grounded circuit, and that not even the legislature of the state could take away from it or injure this franchise, on the faith of which it has expended its capital and labor. Special privileges or immunities are under the control of the legislature. If granted, they may be altered, revoked or repealed by the general assembly. Const., art. 1, § 2. And, while corporations with valuable franchises may be formed under general laws, all such laws may, from time to time, be altered or repealed. Const., art. 13, § 2. In view of these constitutional provisions, it is clearly within the power of the general assembly to authorize one class of corporations to use in the streets electricity with the grounded circuit, as a motive power, and another class to employ the same or a similar agency for the transmission of telegraphic or telephonic messages. And, if the proper exercise of the rights granted to the one class, under general law, is irreconcilable, and plainly interferes with a prior grant to a corporation of the other class, it may be construed as the intention of the legislature to deny an exclusive franchise, if not to repeal the antecedent grant.

In view of the special benefit conferred by the grant of corporate power, it is evident that the primary object or design of the state in granting the franchises of telegraph and telephone companies is, in a large measure, to subserve the public benefit and convenience, and not the mere pecuniary advantage of the owners of the corporate property. The exercise of their corporate privileges is subordinate to the accommodation of those who travel on the streets or highways — "the profit to the proprietors being a mere mode of compensating them for their outlay of capital in

providing and keeping up the public easement." Shaw, C. J., in *Com. v. Temple*, 14 Gray, 69, 77. "It is in contemplation of such companies being thus subservient to the promotion of the public convenience and welfare that the legislature has granted to them the privilege, among others, of exercising the power of eminent domain, by entering upon any land, and appropriating so much thereof as may be deemed necessary for the erection and maintenance of poles, piers, abutments, wires and other necessary fixtures.

Having received their corporate franchises from the state, they hold them in implied trust for the benefit of the community at large, and subject to the constitutional grant of legislative power to control the exercise of those franchises, in the future, as the public good may require. A franchise, if granted by the state with a reservation of a right of appeal, must be regarded as a mere privilege while it is suffered to continue, and the legislature may take it away at any time, and the grantees must rely for the perpetuity and integrity of the franchise granted to them, solely upon the faith of the sovereign grantor. *Pratt v. Brown*, 3 Wis. 603; *Cooley Const. Lim.* (6th ed.) 472. But, in the absence of such a reservation, its force and effect may be attained through the constitutional power vested in the general assembly to alter or repeal, from time to time, all general laws under which corporations are formed, and to alter, revoke or repeal all special privileges or immunities that may have been granted. In illustration of what we have said, is the case of *Lake Shore & M. S. Ry. Co. v. Cincinnati, S. & C. Ry. Co.*, 30 Ohio St. 604. In that case the Lake Shore and Michigan Southern Railway Company instituted proceedings to appropriate, for the construction of its railroad, the right and privilege of crossing with its track and way the track and way of the Cincinnati, Sandusky and Cleveland Railroad Company. It was the decision of the court, as set forth in the syllabus, that every railroad corporation in this state accepts its charter and franchises, and owns and uses its tracks, subject to the power of the state to authorize the construction of other railroads across its tracks whenever the public welfare may require. Neither the priority of one charter over the other, nor the prior location or construction of a railroad thereunder, affects this right.

Under the constitution and laws of this state, the right of one railroad corporation to cross the track of another, in constructing and operating its road, is derived by grant of the franchise so to do from the state, and not by purchase or appropriation from the road first located and constructed. The latter has no vested exclusive right to such crossing for its use against the right of the public to a crossing. The court further held that the railroad company across whose track a right of way was condemned could not recover for an injury to its franchise as a railroad; and that detention of trains, loss of future business, or additional expenses incident to the future exercise of its corporate powers, could not be taken into the account in estimating consequential damages.

It is contended, however, in behalf of the defendant in error, that conceding their railway company and the telegraph association to be upon an equal footing on the streets and highways in the enjoyment of their respective franchises, the company is bound to conform to the rule, *sic utere tuo ut alienum non laedas*. In the view which we take of the relation to each other of the parties to the action, we deem it unnecessary to inquire whether there has been a want of conformity and to what extent, if any, on the part of the railway company, to the requirements of the legal maxim. Nor do we think it necessary to determine how far an incorporated company making a lawful and careful use of its own property, or of a franchise granted to it by the proper municipal authorities, may be held liable for damages incidentally caused to another. From the undisputed facts in the case, as disclosed in the record and printed arguments of counsel, it is evident, as we have already seen, that the railway company acquired from the state and from the city of Cincinnati, authority to erect and maintain poles and wires in the streets or highways, and to use electricity as a motive power for its cars. Clothed with such authority, we have, upon weighing the allegations in the original petition, and applying to them the well-settled principles governing the legal rights of the public in the highways, reached the conclusion that the facts set forth in the petition are not sufficient to constitute a cause of action. We are of the opinion that there has been no invasion of the rights of the telegraph association by the plaintiff in error, and that the telegraph association is not entitled to the relief prayed for in its petition. The judgment, there-

fore, of the superior court at general and special term must be reversed, and the petition dismissed. Judgment accordingly.*

Electric poles and wires in streets.— On the use of streets for electric poles and wires, whether for lighting, the transmission of intelligence or for railway purposes, see the following cases in these reports: *Newport v. Newport Light Co.*, 1 Am. R. R. & Corp. Rep. 397; *Taggart v. Newport Street Ry. Co.*, 2 Am. R. R. & Corp. Rep. 44; *Western Union Tel. Co. v. Williams*, 2 Am. R. R. & Corp. Rep. 258; *Potter v. Saginaw Union Street Ry. Co.*, 3 Am. R. R. & Corp. Rep. 444.

HOLMES & GRIGGS MANUFACTURING CO. V. HOLMES & WESSELL
METAL CO. ET AL.

(Court of Appeals of New York, Second Division, June 2, 1891.)

1. CORPORATIONS. POWERS. SALE OF ENTIRE PROPERTY FOR STOCK IN ANOTHER CORPORATION. A private corporation may, with the consent of all its stockholders, sell all its property to another corporation, and take stock of the latter company in payment therefor.

2. ESTOPPEL OF PURCHASER FROM CORPORATION TO DENY ITS TITLE. One who has bought property from a corporation cannot, when sued for the price, set up in defense that the corporation had no power to buy and sell the property.

3. SALE OF STOCK. TENDER. PRACTICE. Where a note is given in payment for stock to be delivered to a third person, failure to tender the stock is no bar to an action on the note.

A PPEAL from surrogate court, general term, first department.

Adam C. Ellis for appellants. *Sidney S. Harris* for respondent.

HAIGHT, J. This action was brought to recover the amount of a promissory note bearing date December 1, 1884, executed by the defendant the Holmes & Wessell Metal Company, and indorsed by the defendants Morse and Shonnard. The defenses were *ultra vires*, no consideration, and a non-tender of certain stock for the purchase-price of which the note was given. The plaintiff is a manufacturing corporation organized under the general act of 1848 for the purpose of manufacturing sheet and rolled brass wire tubing and other articles composed wholly or in part

* Reported 37 N. E. Rep'r. 890.

of metal, in the city of New York. Its president was Charles E. L. Holmes, and its secretary and treasurer was George C. Edwards. On the 12th day of July, 1881, Holmes and Edwards entered into an agreement with the defendants Shonnard, Morse, and one Charles Wessell to organize a new company for the manufacture of brass, nickeline alloys, and other composite metals, under the corporate name of the "Holmes & Wessell Metal Company;" the capital stock of such company to be \$100,000, the whole amount to be issued and paid up in cash, three-fourths thereof to be subscribed and paid by Holmes and Edwards, and the remaining one-fourth by the other parties to the agreement. The agreement, in its preamble, recites that Holmes and Edwards propose to transfer the rolling-mill belonging to the plaintiff, including all the machinery, tools and appliances connected therewith, together with the lease of the premises occupied by the plaintiff, for the sum of \$50,000. Subsequently, and at an annual meeting of the plaintiff's stockholders held on the 20th day of July, 1881, the president and secretary were instructed to sell to the Holmes & Wessell Metal Company the entire machinery and plant owned by the plaintiff, for the sum of \$50,000; and also authorized them to sell to the same company all the material manufactured, unmanufactured and in process of manufacture, owned by the plaintiff, and to also subscribe for three thousand shares of the capital stock of the company, and to pay for the same out of the proceeds of the sale of the mill and materials. It further appears that the Holmes & Wessell Metal Company was incorporated on the 15th day of July, 1881, and that Charles E. L. Holmes subscribed for two thousand shares, and George C. Edwards one thousand shares, of the capital stock. Thereafter, and on the 23d day of July, 1881, the new company, at a meeting of its stockholders, authorized the purchase from the plaintiff of its plant and machinery, and to pay therefor the sum of \$50,000, and for the entire stock of materials, manufactured and unmanufactured, owned by the plaintiff the sum of \$31,333.96; and, on the 1st day of September thereafter such sale was completed by the transfer of the plaintiff company to the defendant company of its entire plant, machinery, etc.; and, in payment therefor, the defendant company issued to George C. Edwards, trustee, the stock subscribed for by Holmes and Edwards, amounting to \$75,000, and the balance, \$6,333.96 was paid

in cash. After such transfer, the plaintiff discontinued its business. On the 1st day of December, 1884, the plaintiff entered into a contract with the defendants Morse, Shonnard, and one Charles Wessell, in which the plaintiff agreed to sell to the other parties thereto one thousand four hundred and forty shares of the stock of the defendant company, standing in the name of Edwards, as trustee, for the sum of \$30,000, payable, \$5,000 in cash, and the balance by certain promissory notes, of which the note in suit is one. The agreement further provided that the stock should remain in the name of Edwards or some other officer of the plaintiff, as trustee, that it might be voted upon by him until delivered, as specifically provided in the contract.

It is doubtless true that a corporation cannot purchase or deal in stocks of other corporations, unless expressly authorized by law so to do. *Talmage v. Pell*, 7 N. Y. 328; *Berry v. Yates*, 24 Barb. 200; *Milbank v. Railroad Co.*, 64 How. Pr. 20; *Mechanics'*, etc., *Mut. Sav. Bank Bld. Assn. v. Meriden Agency Co.*, 24 Conn. 159; *Central R. Co. v. Pennsylvania R. Co.*, 31 N. J. Eq. 475; *Hazlehurst v. Railroad Co.*, 43 Ga. 57; *Valley R. Co. v. Lake Erie Iron Co. (Ohio)*, 18 N. E. Rep'r, 486; *People v. Trust Co.*, 130 Ill. 268, 284; 22 N. E. Rep'r, 798; *Franklin Co. v. Lewiston Institution*, 68 Me. 43; *Hill v. Nisbet*, 100 Ind. 341, 349. It is equally true, however, that it may do whatever may be necessary in the exercise of its corporate franchises. The selling of property and collection of debts is among the powers given; and hence it may take title to all kinds of property, even the stock of another company, in the payment of a debt. *Talmage v. Pell*, *supra*, and cases above cited. The statute under which the plaintiff was incorporated provides that "it shall not be lawful for such company to use any of their funds in the purchase of any stock in any other corporation." Laws 1848, chap. 40, § 8. The funds here spoken of evidently mean the money of the company, and the statute was not intended to limit the powers of the corporation beyond that already indicated. The plaintiff was a private manufacturing corporation. It exercises no powers of a public nature, and has attempted no combination by which the public may in any manner be prejudiced. There are, consequently, no questions affecting public policy to be considered. The purpose of the company is expressed in a preamble to the resolutions

adopted authorizing the sale of its plant and stock of materials on hand to the defendant company. It was, in short, to increase the business of the stockholders by adding to the manufacture of brass that of German silver and nickel alloys. The scheme adopted was the organization of a new corporation, bringing in some other persons with additional capital. The stock in the new company was subscribed for by Holmes and Edwards individually, and the stock when finally issued was issued to Edwards. It is true, he takes it as trustee, and holds it as such for the plaintiff; but this we do not regard as necessarily *ultra vires*. The plaintiff had the right, with the consent of its stockholders, to sell its plant and retire from business; and it appears from the evidence in this case that the consent of all the stockholders was given to the sale that was made. In *Kent v. Mining Co.*, 78 N. Y. 159, 186, Folger, J., in delivering the opinion of the court, says that "a corporation may do acts which affect the public to its harm, inasmuch as they are *per se* illegal or are *malum prohibitum*. Then no assent of stockholders can validate them. It may do acts not thus illegal, though there is want of power to do them, which affect only the interests of the stockholders. They may be made good by the assent of the stockholders, so that strangers to the stockholders, dealing in good faith with the corporation, will be protected in reliance upon those acts." In the case of *Treadwell v. Manufacturing Co.*, 7 Gray, 393, 405, it was held that the directors of a manufacturing corporation may sell the whole property of the corporation to a new corporation, taking payment in shares of stock of the new company, to be distributed among the stockholders of the old company.

In *Howe v. Carpet Co.*, 16 Gray, 493, it was held that one manufacturing corporation may take the shares of another in payment of a debt. Chapman, J., in delivering the opinion of the court, in commenting upon the case of *Treadwell v. Manufacturing Co.*, *supra*, says that "while corporations *quasi* public may be restrained and directed in the management of their affairs, yet corporations established for trading and manufacturing purposes may wind up their affairs whenever they think proper to do so, and in the manner adopted in that case. The legality of the transaction could not have depended on the intention of the corporation to wind up its affairs immediately. If it had taken the

stock in the payment for goods, or of the sale of a building or land, or water-power, which it did not want or desire to sell, while it still carried on its business, the act must have been equally legal." In *Hodges v. Screw Co.*, 1 R. I. 312-347, facts are presented which, in many respects, are similar to those under consideration. Greene, C. J., says: "Nor have we any doubt that the screw company might have rightfully taken this stock in the iron company in payment for their rolling-mill, if it had been taken with a view to sell again, and not permanently hold it. Again, it is to be observed, the directors were not investing the funds of the screw company in the stock of the iron company. They had on hand an unsalable rolling-mill, and they owed a heavy debt for it, and one great object in taking the stock in the iron company was to realize for the rolling-mill, and in part pay thereby the debt." *State v. Canal Co.*, 40 *Kans.* 96; 16 *Pac. Rep'r*, 349; *Leathers v. Janney*, 41 *La. Ann.* 1120; 6 *South. Rep'r*, 884; *Hibernia Ins. Co. v. St. Louis & N. O. Trans. Co.*, 13 *Fed. Rep'r*, 516; *Taylor v. Mining Co.*, 79 *Cal.* 285; 21 *Pac. Rep'r*, 753; *Ditch Co. v. Zellerbach*, 37 *Cal.* 543; *State v. Butler*, 86 *Tenn.* 614; 8 *S. W. Rep'r*, 586; *Mor. Pri. Corp.*, § 212. The plaintiff has sold its rolling-mill, machinery, etc., to the defendant. It has taken stock in the latter company in payment therefor. Inasmuch as this was done with the consent of all the stockholders, it being the act of a private corporation, not in any manner harming the public, we see no reason for condemning its title to the stock so obtained. *Palmer v. Cemetery*, 122 *N. Y.* 429-435; 25 *N. E. Rep'r*, 983.

But, assuming the transaction to have been *ultra vires*, the defenses interposed would still be unavailable. The plaintiff has the stock, and has paid for it. It cannot be recovered back by the defendant, for the transaction is completed and closed. While the contract remained executory, if it was unauthorized, a stockholder or person interested might have interfered by injunction, and prevented the transfer of the property of the plaintiff to the defendant. But, the contract having become executed, the title of the stock now vests in the plaintiff, and it has the power to sell and dispose of the same. *Sistare v. Best*, 88 *N. Y.* 527-533; *Milbank v. Railroad Co.*, *supra*. The contract under which the note in suit was given was made in December, 1884, nearly four

years after the plaintiff became the owner of the stock. No claim is made that that contract is for any reason illegal or void. Numerous cases are found in which the courts have refused to execute contracts that were *ultra vires*, but this action is not based upon such a contract. The courts will not permit the plea of *ultra vires* to prevail, whether interposed for or against a corporation, where it would not advance justice, but would accomplish a legal wrong. *Raft Co. v. Roach*, 97 N. Y. 378-381; *Arms Co. v. Barlow*, 63 N. Y. 62. To hold that the plaintiff could not dispose of the stock would deprive it of the consideration received for the transfer of its rolling-mill and material, thus accomplishing a wrong, and not advancing justice. Our conclusions are that it had title to the stock, and that, consequently, there was a valuable consideration for the note in suit. The question raised in reference to the non-tender of the stock was properly disposed of by the general term. The judgment should be affirmed, with costs.

All concur.*

Corporations — sale of assets for stock in another corporation. — On this subject, see generally, *Mason v. Pewabic Min. Co.*, 1 Am. R. R. & Corp. Rep. 227, and note; *Baltman, etc., R. Co. v. Cannon*, 8 Am. R. R. & Corp. Rep. 202; *Small v. Minneapolis Electro-Matrix Co.*, ante, p. 81; *Central Trans. Co. v. Pullman's Palace-Car Co.*, ante, p. 172.

NATIONAL DOCKS & N. J. J. C. RY. CO. v. STATE (UNITED N. J. RAILROAD & CANAL CO. ET AL., PROSECUTORS).

(Court of Errors and Appeals of New Jersey, March 4, 1891.)

1. EMINENT DOMAIN. RAILROAD CROSSINGS. One railroad company may condemn the right to cross the lands of another company of the same character, although those lands be necessary for the railroad purposes of the latter company.

2. SPECIFYING MANNER OF CROSSING IN PETITION. EFFECT. The condemning company may, by its petition in condemnation proceedings, designate a lawful manner in which it will cross the lands of the other company, and make compensation for that single manner of crossing, in which case it can thereafter cross only in accordance with the plan thus designated.

3. When such petition prescribes the manner of crossing, the legality of the

* Reported in 27 N. E. Rep'r, 831.

plan and manner of crossing proposed may be reviewed in the supreme court upon *certiorari*.

4. WHERE MANNER OF CROSSING NOT SPECIFIED. DAMAGES. Where the condemning company fails to define in its petition how it will cross, and seeks to condemn the privilege of crossing generally, the damages are to be assessed, not only for any manner of crossing at present lawful and necessary, but also for lawful changes in the manner of crossing in the future.

5. RIGHTS ACQUIRED BY CONDEMNING COMPANY. In such a condemnation, all that is acquired is the privilege or easement of crossing. The place of crossing is to be and remain in the common use of both companies for the exercise of their respective franchises.

6. REMEDY IN CASE OF CONFLICT AS TO USE OF CROSSING. If the use of such easement, whether it be acquired under proceedings to condemn a crossing in a specified manner or under proceedings to condemn a crossing generally, a conflict should at any time arise between the companies entitled, the interposition of equity may be invoked to secure to each company the enjoyment of its privilege in a just and lawful manner.

7. PETITION. DESCRIPTION OF LANDS SOUGHT TO BE TAKEN. The description in the petition considered and held to be sufficient by a majority of the court.

8. RIGHT TO CONDEMN FOR A RAILROAD LESS THAN ONE MILE IN LENGTH OR FOR A CONNECTING ROAD. Under the act to authorize the formation of railroad corporations and regulate the same, approved April 2, 1878 (Revision 925), and its supplements, a railroad less than a mile in length may be built, and an independent company may be organized to build a railroad which will connect two existing railroads.

ERROR to supreme court.

Gilbert Collins and *John R. Emery* for plaintiff in error.
James B. Vredenburg and *Joseph D. Bedle* for defendants in error.

McGILL, Ch. The plaintiff in error was organized in pursuance of the provisions of the act to "authorize the formation of railroad corporations and regulate the same," approved April 2, 1878 (Revision, 925), and its supplements, known as the "General Railroad Law," for the purpose of building a railroad about two thousand six hundred feet long, within the corporate limits of Jersey City. On the 10th of December, 1888, it filed a survey of the route and location of its proposed road. That survey provides that it is to commence at a point in the route of the National Docks railroad south of Montgomery street, and run northerly several courses about one thousand five hundred feet, to the lands

of the defendants, and then for more than one thousand feet, through the defendants' lands, to a point in the route of the New Jersey Junction Railroad Company, thus forming a direct connection between the routes of the National Docks and New Jersey Junction Railroads. The land of the defendants first traversed by this route is an embankment, immediately adjoining, running parallel with, and elevated about twenty-three feet above Railroad avenue, one of the public streets of Jersey City. Upon this embankment, for many years, the main line of the defendants' railroad was constructed and operated, but that line now being shifted to the north the embankment is occupied by a side track. Immediately north of this embankment, for two or three hundred feet, is ground raised to the grade of the old embankment by filling up a hollow, which the defendants propose to use, in connection with their old main line embankment, as a car-yard, made necessary by the elevation of their tracks through Jersey City. North of this land is an embankment upon which the defendants' new main line is constructed, and then some partially filled, but unused meadow. The terminus of the route is at or near the point where the New Jersey Junction railroad crosses the defendants' right of way from their main line to their freight depots in Harsimus Cove, over which, upon an elevated iron trestle or bridge its freight tracks are laid. When the New Jersey Junction railroad as it is at present constructed, emerges from under the defendants' freight line, it curves to the east, and ascends to the defendants' main line, making a connection with it, although its filed route shows that it was contemplated that the main line should not curve to the east, but continue in a southerly direction. This curved extension to the connection with the defendants' road is in the location of branch No. 7, represented upon the filed route of the New Jersey Junction railroad, and although, as constructed, it appears to be a continuation of the main line, it is called "Branch Railroad No. 7." At a point nearly opposite the commencement of this curve, or the place of departure of branch No. 7 from the main line of the Junction railroad, the defendants have cut through the embankment upon which their new main line is constructed, walled the cut, and carried their main line over it upon a bridge. Through this cut, under the bridge, they have laid two tracks. It is in evidence that their purpose in

making this cut was to provide an under-grade connection through their land with the National Docks railroad, but that such intention has been abandoned. The plaintiff now proposes to utilize this cut for its road, and to continue it, with suitable walls, southerly, through the defendants' proposed car-yard, to Railroad avenue. As the plaintiff's road must cross that avenue above or below the street's grade (Revision, p. 930, § 14), and it appears to be impracticable for it to cross below the grade, it will be necessary for it, after it passes the defendants' main line, to gradually raise the bottom of its cut through the defendants' land, so that at Railroad avenue it may be the requisite distance above the surface of that street. In that event, to enable the defendants to use their land between their main line and Railroad avenue for a car-yard, on both sides of this cut the grade must be gradually raised from the new main line southerly. The maximum of the change thus required will be at the embankment upon which the old main line was constructed, eight feet and a half above the present grade at that point, and three feet and ten inches above the grade of the defendants' new main line.

By this petition for the appointment of commissioners to assess the compensation and damages to be paid to the defendants for the proposed crossing, the plaintiff has specified the manner in which it intends to cross that part of the defendants' lands which appears to be necessary for railroad purposes. The cut, together with that now existing under the defendants' main line, is to be five hundred and twenty-four feet long, walled on both sides with walls constructed of stone resting on solid foundation, twelve feet in width at the bottom and five feet in width at the top, with a batter on the inner face of half an inch to a foot. The inner faces of the wall are to be thirty feet apart, at the level of the rails in the proposed road. These walls are to unite with and continue the walls which support the defendants' main line over the cut now existing under that line, and to gradually rise, upon a grade of eighty-two hundredths of a foot to each one hundred feet, until, at Railroad avenue, they shall be thirty-one feet above the crown of the road-bed of that highway. The walls are to be competent to support half through girder railroad bridges at every point, and the defendants are to have the right to use the walls to support such bridges, and for all other purposes which will not interfere with the proper use of the plaintiff's proposed railroad.

At this point in the statement of facts two inquiries are presented: First, whether in acquiring the crossing over an existing railroad a condemning company may, by its petition, designate the manner of crossing and make compensation for such crossing only, or whether it must condemn the right to cross generally, subject to such restrictions and requirements in the use of the right it may acquire as the court of chancery may reasonably prescribe, making compensation predicated upon anticipated and possible regulation; and, second, whether a crossing which interferes with the present use, or intended use, of railroad lands for railroad purposes, is lawful. The right of one railroad to cross another which is intersected by its route is so plainly essential to its construction for any considerable distance that it has become indisputably established by implication from mere authority to build a railroad between given points (*Morris, etc., R. Co. v. Central R. Co.*, 31 N. J. Law, 205; *National Ry. Co. v. Easton, etc., R. Co.*, 36 N. J. Law, 182; *New Jersey, etc., R. Co. v. Commissioners*, 39 N. J. Law, 28; *Railroad Co. v. Drummond*, 46 N. J. Law, 644), and the general railroad law recognizes this right in railroads incorporated under it in terms so unambiguous as to be tantamount to express authority. Revision, p. 934, § 36; *State v. Tunnel Co.*, 38 N. J. Law, 548. The right, however, is by implication from necessity, and its exercise must, therefore, be limited by the necessity of the condemning road. In the condemnation of a crossing over the lands of another railroad which are necessary for railroad purposes, all that is acquired is a right of way. After such condemnation, the place of crossing remains in the common use of both railroads for the exercise of their respective franchises.

The manner of crossing is not to be destructive of the ability of the road crossed to fully, fairly and freely exercise its franchises. *National Ry. Co. v. Easton, etc., R. Co.*, 36 N. J. Law, 181; *New Jersey, etc., R. Co. v. Commissioners*, 39 N. J. Law, 28; *Lehigh Valley R. Co. v. Dover, etc., R. Co.*, 43 N. J. Law, 528; *Railroad Co. v. Drummond*, 46 N. J. Law, 644. It is not perceived that there can be tenable or sufficient objection to the designation of the manner of crossing in the petition in condemnation proceedings. It is within the power of one railroad to determine by the location of its route where it will cross another

(National Docks R. Co. v. Central R. Co., 32 N. J. Eq. 755); and it is impossible to perceive a sufficient reason why it may not also determine, within lawful bounds, how it shall cross the other. When a crossing is sought in a manner specified in its petition, the condemning company will make compensation for a crossing in that single manner, which, if it may thereafter be materially changed, may not be so changed without additional compensation for the damage which the change may occasion. The specification upon the record, of the exact method of using the right of way to be acquired, limits the compensation to the damages which may result from such use, and there can be no presumption, as in case of a general condemnation (Lewis Em. Dom., § 565; Van Schoick v. Canal Co., 20 N. J. Law, 249; Ten Eyck v. Canal Co., 18 N. J. Law, 200; Canal Co. v. Lee, 22 N. J. Law, 243; Water-Power Co. v. Chambers, 13 N. J. Eq. 199), that all damages, both present and prospective, including those occasioned by subsequent changes in the plan of crossing, have been considered and allowed. When the petition prescribes the manner of crossing, the effect upon the road crossed being thereby discernible, it is apparent that the legality of the proposed plan may be conveniently and properly questioned before the condemnation proceeds; not by the judge to whom the petition is presented, whose jurisdiction is limited by statute, but by the supreme court, under its general supervisory powers upon *certiorari*. State v. Tunnel Co., 88 N. J. Law, 548.

At this point the second question suggested — whether a crossing which interferes with the present use or intended use of railroad lands for railroad purposes is lawful — arises. As has been stated, in the acquisition of a right to cross, the ability of the existing company to fully, fairly and freely exercise its franchises is not to be destroyed. It is not the policy of the law to cripple or destroy one highway for the purpose of erecting another. The purpose is to preserve, multiply and maintain highways for the development of the country and the general public benefit; and this purpose is especially manifested in the general railroad law, where there exists a prohibition against the condemnation of lands used for railroad purposes, except for a mere crossing. But it does not follow that the precise existing use of the land crossed may not be interfered with. There can be no reason why such

use should not yield, if the proposed interference with it is necessary, and of a character that will not destroy the reasonably fair enjoyment and exercise of the franchises of the company whose road is crossed. Ability to enjoy all its privileges and to perform all its duties in a proper and reasonable manner being secured to the latter company, it must, upon being duly compensated, submit to the necessary inconvenience and damage which the crossing may occasion. This view of the law has already found expression in this court, both in *Railroad Co. v. Drummond*, 46 N. J. Law, 644, and *State v. Tunnel Co.*, 38 N. J. Law, 548. In recognizing the right of the condemning company to specify a lawful manner of crossing and to condemn a crossing in that manner the right to condemn without such specification must not be lost sight of. Where such a company fails, in its petition, to define how it will cross, but seeks to condemn the privilege of crossing generally, the damages are to be assessed as in the case of the condemnation of lands of private individuals for railroad uses, not only for any manner of crossing at present lawful and necessary, but for lawful changes in that manner of crossing in the future. That which is acquired in such a condemnation, as in the case where the manner of crossing is specified in the petition, is a mere privilege or easement in lands, which are subject to a like privilege in favor of the road which is crossed. If in the use of this common easement, whether it be acquired under proceedings to condemn a crossing in a specified manner, or under proceedings to condemn a crossing generally, conflict should at any time arise between the companies, the interposition of equity may be evoked, according to the principles declared in *Delaware, etc., R. Co. v. Erie Ry. Co.*, 21 N. J. Eq. 299, and approved in this court in *National Docks R. Co. v. Central R. Co.*, 32 N. J. Eq. 767, to secure to each the enjoyment of its privilege in a lawful manner.

The proofs in the present case disclose that the projected crossing now considered cannot be effected without considerable inconvenience and damage to the defendants. It will necessitate a change in the proposed car-yard, which will not only be, in itself, expensive, but will also render the future operation of the yard more difficult and costly to its managers and dangerous to their employes by reason of heavy grade and of a cut through its cen-

ter, unless an expensive change in the proposed grade of the defendants' elevated tracks, now in course of construction through Jersey City, is made, and some safe covering for the plaintiff's cut is devised. The necessities of the defendants appear to forbid the abandonment of their yard or its transfer to another locality. But, however serious this inconvenience and damage may be, it does not appear that they will be either destructive to the ability of the defendants to fully and fairly exercise their franchises and perform their duties, or of such character that they may not be adequately compensated in damages. In addition, it appears to be reasonably necessary that the plaintiff's projected crossing shall be effected in the manner and at the place proposed. East of that place is a closely-built city, which can be passed through only at an enormous cost; and on the west is a net-work of the defendants' tracks and a rocky hill, which present almost insuperable obstacles in that direction. It is not suggested or perceived how a route more desirable or convenient to either the plaintiff or defendants, between the termini of the plaintiff's road, could be selected. The projected crossing, then, is not unlawful. In addition to the crossing over the lands of the defendants, which appear to be necessary for their railroad purposes, the plaintiff proposes to acquire a portion of the unused meadow north of the defendants' new main line embankment "twenty-seven and a half feet wide on each side of its center line, except at or near the extreme northerly end thereof, where it requires thirty-seven and a half feet in width on the easterly side of said center line." The plaintiff's petition contains a particular description of the land thus sought to be condemned, in which the northerly end of that land is described as follows: "Thence curving to the left on a radius of five hundred and forty-six and two-tenths (546 2-10) feet a distance of one hundred and sixteen (116) feet to a point opposite the southerly end of the westerly wall or abutment supporting the tracks of the Pennsylvania Railroad Company, known as the 'Harsimus Cove' or 'Freight' tracks; thence (S., 63° 50' E.) south, sixty-three degrees and fifty minutes east, a distance of twenty-two and a half (22½) feet, to the corner of said last-mentioned wall or abutment; thence (N., 26° 10' E.) north, twenty-six degrees and ten minutes east, along the face of said wall or abutment a distance of eighteen and seventy-eight one-hundredths

(18 78-100) feet to a point five (5) feet westerly from station (25+94 8-10) twenty-five plus ninety-four and eight-tenths feet, being the point of ending of said center line; thence in a course about (S., 63° 50' E.) south, sixty-three degrees and fifty minutes east, a distance of forty-two and five-tenths (42 5-10) feet, running through the end of said center line, as filed, to a point thirty-seven and a half feet easterly thereof; thence (S., 26° 10' W.) south, twenty-six degrees and ten minutes west, a distance of twenty-seven (27) feet, to a point in the division line between the lands of said Pennsylvania Railroad Company and the New Jersey Junction Railroad Company." It is objected that the land thus described is not within the plaintiff's located route, and that, therefore, it cannot be taken by condemnation. This view was adopted by the supreme court. The objection grows out of the uncertainty as to the location of the northerly terminus of the filed route.

It is stated in the survey of that route to be a point on the line of the New Jersey Junction railroad, as constructed, which is "the point of departure of branch railroad No. 7 of the last-mentioned railroad company, as filed March 2, 1886, in the secretary of state's office." Now, that which is filed in the secretary of state's office exhibits center lines only, and the point of departure of branch No. 7, as there shown, is the point at which the center line of the branch leaves the center of the main line. If the point thus indicated be the terminus intended, it is clear that the condemnation contemplates the taking of land outside of the filed route of considerable and valuable proportion. The courses given in the survey of the route, however, do not lead to this point, and, if those courses be run, the distances given in the survey, without qualification, the terminus would be several feet north-west of the departure of the center line of the branch from the center of the main line of the Junction railroad, upon a curving rail on the westerly side of the westerly track of that road, a point which is not indicated upon any survey of the New Jersey Junction railroad which is filed in the office of the secretary of state. But the distances in the survey are qualified. It is expressly stated that they are to be taken "more or less;" and the survey provides that the terminus is to control the distances. The terminus is not a visible monument, but it is capable of ascertainment, and by the express provisions of the survey it is given the character of a vis-

ible monument. The engineer of the plaintiff in error explains that the words "more or less" were designed to make the distances, which were expressed in figures, sufficiently elastic to reach the exact point on the curved westerly rail of the New Jersey Junction railroad, as that railroad is now constructed, where it may be determined that the branch No. 7 departs upon that rail from the main line, the exact point being uncertain. The courses of the survey lend credence to this explanation, but the description of the terminal point is at decided variance with it. It is impossible to reconcile all parts of the description. It is suggested that the court should consider the description of the terminal point elliptical, and supply words to make it conform to the theory of its meaning advanced by the plaintiff. We perceive no warrant for so doing in view of the fact that the terminal point intended is not identified. It is deemed that the great value of the property and the conflict of important railroad interests at this point render it necessary that the disputed terminus should be so described that it will be capable of definite and unmistakable ascertainment. As it is now designated it is so indefinite and uncertain that it is impossible to say that the land sought to be condemned is all within the plaintiff's located route. We think that this uncertainty vitiates the proceedings reviewed.

The defendants present two other objections to the proceedings considered, which demand attention because they question the plaintiff's legal existence. The first is that the general railroad law does not authorize the construction of a railroad less than a mile in length, and the second is that a connection between two railroads incorporated under that law cannot be accomplished by an independent corporation. It is argued in support of the first of these propositions that the rating of the deposit to be made with the state treasurer at the time of incorporation, and the charges that the company may make for transportation, and the minimum of the company's capital stock, by the mile, conclusively exhibit the legislative intent that the railroads contemplated by the law shall be more than a mile in length. The statute expressly provides for two classes of railroads—those more than ten miles long and those less than ten miles in length; but it makes no minimum limit of length in the latter class. The design of the law is to subserve the public good. Consequently every

railroad incorporated under it is expressly required to transport such passengers and property as shall be properly offered for transportation at its depots. Revision, p. 932, § 26. The test of the road intended is its public use and benefit, and not its extent or length. *Commissioners v. West End R. Co.*, 29 N. J. Eq. 566; *National Docks R. Co. v. Central R. Co.*, 32 N. J. Eq. 755, 766. The law-makers apparently considered the utility of a legislative limitation of the length of a railroad to be so questionable, in view of the fact that capital will not seek unremunerative investment and duties, that they did not impose it. This interpretation of the statute is now too well established in our courts to be disturbed. The public convenience and benefit being subserved, which is exhibited by the investment of capital, the railroad may be less than a mile in length. The second objection — that a connection between two railroads cannot be accomplished by an independent corporation — is claimed to be supported by the provisions of the twenty-third section of the general railroad law, which it is said contemplates an extension of or an addition to an existing road, to form a desired connection, and by the supplement of 1880 (P. L. 94) to the "Act concerning railroads" (Supp. Revision, p. 823, § 7). The latter act appears to be directed to specially chartered railroads. But at best both the laws referred to merely confer power to make railroad connections. I fail to find any thing in the statute which prohibits the connection of two railroads by an independently incorporated company. In *Commissioners v. West End R. Co.*, above cited, it was said that the twenty-third section of the general railroad law expressly declares that a corporation whose road shall be constructed under this law shall have the right to connect its road with any railroads within this state or any other state, and that the sole purpose of the acquisition of corporate functions by the defendants in that case was to build a connecting road between two existing roads, and that such purpose is specially legalized. We do not think that this objection is well taken. Other objections go merely to the regularity of the plaintiff's proceedings, and, as we think that those proceedings are vitiated by the uncertainty whether the land which the plaintiff seeks to condemn is within its located route, it is not necessary to consider them. Our conclusions upon the points stated lead to an affirmation of the judgment of the supreme court.

PER CURIAM. The judges voting to reverse the judgment of the supreme court in the above-entitled cause concur in the opinion delivered by the chancellor, except so far as it holds the petition to be defective. Deeming the petition sufficient, we think the judgment below should be reversed.*

For affirmance, McGill, Ch., Beasley, C. J., and Dixon, Van Syckel, JJ. For reversal, Brown, Clement, Cole, Smith, and Whitaker, JJ.

Eminent domain — crossing of one railroad by another — damages.—The subject of damages where one railroad crosses another is considered in the following cases: *Chicago, etc., R. Co. v. Springfield, etc., R. Co.*, 67 Ill. 142; *S. C.*, 96 Ill. 274; *Lake Shore, etc., R. Co. v. Chicago & Western Ind. R. Co.*, 100 Ill. 21; *Chicago & Alton R. Co. v. Joliet, etc., R. Co.*, 105 Ill. 888; *Chicago & Western Ind. R. Co. v. Englewood Connecting R. Co.*, 115 Ill. 875; *Mass. Central R. Co. v. Boston, etc., R. Co.*, 121 Mass. 124; *Railway Co. v. Railway Co.*, 80 Ohio St. 604; *Pittsburgh, etc., R. Co. v. South Western Penn. R. Co.*, 77 Penn. St. 173; *St. Louis, etc., R. Co. v. St. Louis, etc., R. Co.*, 100 Mo. 419; *Matter of Lockport, etc., R. Co.*, 19 Hun. 38; *Matter of Cortland & Homer Horse R. Co.*, 98 N. Y. 836.

OAKES V. NORTHERN PAC. R. CO.

(Supreme Court of Oregon, March 23, 1891.)

1. **CARRIERS. LOSS OF BAGGAGE. LIABILITY.** Carriers of passengers are responsible for the carriage and safe delivery of such baggage as, by custom and usage, is ordinarily carried by travelers; and the payment of the usual fare includes, in legal contemplation, a compensation for the conveyance of such baggage.

2. **DEGREE OF LIABILITY FOR BAGGAGE.** They are insurers of such baggage in the same manner and to the same extent as for goods or freight.

3. **BAGGAGE DEFINED.** Baggage, within the rule of such liability, is confined to such articles as are usually carried as baggage, for the personal use of the passenger, or for his convenience, instruction or amusement on the journey, and does not include that which is carried for the purposes of business, such as merchandise or the like.

4. **LIABILITY FOR MERCHANDISE WHEN KNOWINGLY RECEIVED AS BAGGAGE.** While the obligation of a carrier of passengers is limited to ordinary baggage, yet if the carrier knowingly permit a passenger, either on payment or without payment of an extra charge, to take articles as personal baggage which are not properly such, it will be liable for their loss or destruction, though without fault.

* Reported in 21 Atl. Rep'r, 570.

APPEAL from circuit court, Multnomah county, E. D. Shattuck, judge.

This is an action brought by the plaintiff to recover from the defendant the sum of \$1,401.25 on account of the alleged failure of the defendant to deliver to the plaintiff certain personal property, specifically enumerated in the complaint, and constituting the contents of seven trunks. The complaint alleges that at the time therein mentioned the plaintiff, together with his wife and several other persons, naming them, constituted the Oakes Comedy Company, an organization giving theatrical entertainments in the villages and cities situated on the line of the company's road, and that on said day, or the night thereof, the plaintiff, as proprietor of said theatrical organization, had engaged and advertised his company to give an entertainment at Thompson's Fall, Mont., and had started with said company of people and baggage, by the defendant's line of road, to said place from Hope, in Idaho; that prior to starting he applied to defendant's ticket agent at said Hope for transportation for himself and other persons aforesaid, and their trunks and contents, and other movable property necessary and proper to be used by them in the business in which they were engaged, and necessary and proper as their wearing apparel; that he informed said ticket agent that he desired transportation for said persons and property, and said agent informed him that it would be necessary for plaintiff to buy five first-class tickets for the sum therein specified to secure such transportation; and that thereupon plaintiff purchased said tickets, and secured said transportation and carriage, etc., and delivered said property to its agents and servants, which was accepted and taken in their charge and care, and for which he received checks in addition to his said tickets; that it refused and failed to deliver, etc.; and through its own negligence said train was wrecked, and a large part of the property was destroyed by fire, etc. The answer of the defendant put in issue all the allegations of the complaint, or that it had any knowledge or information as to the contents of such trunks, or the value thereof, etc. Upon the trial, the jury, at the request of the defendant, were required to find special answers to the following questions: "First. What do you find to be the value of the baggage belonging to the plaintiff and his company which was lost in the wreck of the defendant's cars March 25 last, aside

from the stage properties, costumes, musical instruments and theatrical property of the comedy company? Answer, \$381.25. Second. What do you find to be the value of the stage properties, musical instruments, advertising matter, tickets, stage costumes and stage paraphernalia destroyed in the wreck on the 25th of March last? Answer, \$754.75." At the same time the jury found a general verdict in favor of the plaintiff for \$1,136, being for the full value of all the property belonging to the plaintiff and his company which was lost in the wreck. The counsel for the defendant moved to set aside the general verdict because the same was inconsistent with the special findings found by the jury, and moved the court to render a judgment upon such special findings in favor of the plaintiff and against the defendant for the sum of \$381.25, which the court refused to do, and rendered judgment for the plaintiff for the sum of \$1,136.

Dolph, Bellinger, Mallory & Simon for appellant. *Jones & Stuart* for respondent.

LORD, J. (after stating the facts as above). The defendant does not deny liability for the loss or destruction of the personal baggage of the plaintiff and the members of his troupe, but it denies liability for property other than actual personal baggage. In determining the question presented by this record it is necessary to understand the nature and extent of the obligation which a carrier of passengers by rail assumes as respects the personal baggage of the passenger. That obligation requires it not only to carry the passenger, but also to carry a reasonable amount of his personal baggage. "The carriage of the baggage of the passenger," said Andrews, J., "under reasonable limitations as to amount, is the ordinary incident to the carriage of the passenger; and the duty arises on the part of the company to carry the baggage of the passenger as incident to the principal contract, without any specific agreement or separate compensation." *Isaacson v. Railroad Co.*, 94 N. Y. 278. As respects such baggage, a carrier of passengers is held to the same liability as a common carrier of goods. For its loss or destruction, save by the act of God or the public enemy, it must respond, though without fault on its part. To this extent it is an insurer, and is responsible for the carriage and safe delivery of such baggage, the same as goods intrusted to it as freight. But

it is only to such articles as may be legally termed "baggage" that such liability attaches, no matter what may be the contents of the bag or trunk. As to what constitutes "baggage" in the legal sense, or "ordinary baggage," or "personal baggage," as commonly used in England, it has been found by the courts difficult, if not impossible, to define with accuracy within the meaning of the rule of the carrier's liability. "It is agreed on all hands," said Erle, C. J., "that it is impossible to draw any very well-defined line as to what is and what is not necessary or ordinary baggage for a traveler. That which one traveler would consider indispensable would be deemed superfluous and unnecessary by another. But the general habits and wants of mankind must be taken to be in the mind of the carrier when he receives a passenger for conveyance." *Phelps v. Railroad Co.*, 19 C. B. (N. S.) 321. In a general sense it may be said to include such articles as it is usual for persons traveling to take with them for their pleasure, convenience and comfort, according to the habits and wants of the class to which they belong. In *Weeks v. Railroad Co.*, 9 Hun, 669, it is said that a passenger may carry with him "such articles of necessity and convenience as are usually carried by passengers for their personal use and comfort, instruction and convenience, or protection."

In *Jordan v. Railroad Co.*, 5 Cush. 69, the rule is stated to be "that baggage includes such articles as are of necessity or convenience for personal use, and such as is usual for persons traveling to take with them." In *Johnson v. Stone*, 11 Humph. 419, the court said: "It is not practical to state with precise accuracy what shall be included by the term 'baggage.' It certainly includes articles of necessity and personal convenience usually carried by passengers for their personal use; and what these may be will very much depend upon the habits, tastes and resources of the passenger." In *Railroad Co. v. Swift*, 12 Wall. 262, Mr. Justice Field said that the contract "to carry the person only implies an undertaking to transport such a limited quantity of articles as are ordinarily taken by travelers for personal use and convenience, such quantity depending of course, upon the station of the party, the object and length of his journey, and many other considerations." In *Macrow v. Railway Co.*, L. R., 6 Q. B. 612, Cockburn, C. J., said: "Whatever the passenger takes with him for his

personal use and convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey, must be considered as personal luggage. This would include," he continues, "not only articles of apparel, whether for use or ornament, * * * but also the gun-case or fishing apparatus of the sportsman, the easel of the artist on a sketching tour, or the books of the student, and other articles of analogous character, the use of which is personal to the traveler, and the taking of which has arisen from the fact of his journeying. On the other hand, the term 'ordinary luggage' being thus confined to that which is personal to the passenger, and carried for his use and convenience, it follows that what is carried for the purpose of business, such as merchandise and the like, or for larger and ulterior purposes, such as articles of furniture or household goods, would not come within the description of 'ordinary luggage' unless accepted as such by the carrier." See, also, 1 Amer & Eng. Enc. Law, "Baggage," 1042; 2 Ror. R. R. 988; Hutch. Carr., §§ 677, 683, 686. So that it would seem that baggage, in the sense of the law, may consist of such articles of apparel as, through necessity, convenience, comfort or recreation, the passenger may take for his personal use, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or the ultimate purpose of the journey. The question what articles of property, as to quantity and value, contained in a trunk, may be deemed baggage within the rule, is to be determined by the jury according to the circumstances of the case, subject to the power of the court to correct any abuse. *Railroad Co. v. Fraloff*, 100 U. S. 24; *Bomar v. Maxwell*, 9 Humph. 622; *Brock v. Gale*, 14 Fla. 523; *Mauritz v. Railroad Co.*, 23 Fed. Rep'r, 765.

As the contract of the carrier of passengers is to carry a reasonable amount of baggage for the accommodation of the passenger, it follows from the nature and object of the contract, as observed by Appleton, C. J., "that the right of the passenger is limited to the baggage required for his pleasure, convenience and necessity during the journey." *Wilson v. Railroad Co.*, 56 Me. 62. Articles of whatever kind that do not properly come within the description of ordinary baggage are not included within the

terms of such contract, nor is the carrier liable for their loss or destruction, in the absence of negligence. Stage properties, costumes, paraphernalia, advertising matter, etc., are not articles required for the pleasure or convenience or necessity of the passenger during his journey, but are plainly intended for the larger or ulterior purposes of carrying on the theatrical business. They do not fall, therefore, under the denomination of "baggage," and, in the absence of negligence, no liability can arise against the carrier for their loss or destruction, unless accepted as baggage by the carrier. And so the special verdict of the jury found. They segregated the articles which might properly be termed "baggage" from those carried for the purposes of business, and found separately the value of each, but by their general verdict found the company liable for the full value of the property upon the assumption that the trunks and their contents were received by the company as baggage. The bill of exceptions discloses that the court charged the jury, among other things, as follows: "There is another phase of this question. If you find from all the evidence in the case that these trunks were brought to the agent of the company, and their appearance indicated that they might not only contain the personal baggage, in the strict sense of the word, of the party, but that other things than baggage were received without objection, and no fraud or concealment was practiced by the plaintiff, if the trunks on their face advertised fully what their contents were, and their agents received them under these circumstances, and gave checks for them, and the company, through these agents and employees, took them into its charge without making any objection, then the defendant is to be deemed to have taken these articles as baggage," etc. In substance, the complaint alleges that the defendant was fully informed of the contents of the trunks prior to their delivery, and that the defendant received and checked them as baggage, which is put in issue by the denials of the answer.

Although the bill of exceptions contains no evidence, nor is any certified to us by this record, the issue permitted, and the instruction was designed to meet, the evidence upon this phase of the case. Under such circumstances, we are bound to assume that there was evidence tending to show that the defendant had notice of the nature of the property, and received it as baggage.

for transportation. In this view, the general verdict is not inconsistent with the special findings, for if the defendant knowingly permitted the plaintiff to take as baggage articles that would not come under that description, it is liable for their loss, though not arising from its negligence. While it is true that passenger carriers are not liable for merchandise and the like when packed up with a traveler's baggage, if the baggage be lost, yet if the merchandise be so packed as to be obviously merchandise to the eye, and the carrier takes it without objection, he is liable for the loss. *Story Bailm.*, § 499. Thus, in the case of *Railway Co. v. Shepherd*, 8 Exch. 30, Parke, B., said: "If the plaintiff had carried these articles exposed, or had packed them in the shape of merchandise, so that the company might have known what they were, and they had chosen to treat them as personal luggage and carry them without demanding any extra remuneration, they would have been responsible for the loss. So, also, upon any limit in point of weight, if the company chose to allow a passenger to carry more, they would be liable." And in *Macrow v. Railway Co.*, *supra*, Cockburn, C. J., said: "If the carrier permits the passenger, either on payment or without payment of an extra charge, to take more than the regulated quantity of luggage, or knowingly permits him to take as personal luggage articles that would not come under that denomination, he will be liable for their loss, though not arising from his negligence." In *Sloman v. Railway Co.*, 6 Hun. 546, Gilbert, J., after stating and citing authorities to sustain the proposition that railroad companies are not liable for the loss of merchandise delivered to them under the guise of baggage for transportation along with a passenger, said: "They are liable, if they knowingly undertake to transport merchandise in trunks or boxes, which have been received by them for transportation, in passenger trains, unless the agent who receives the packages for that purpose violates a regulation of the company by so doing, and the passenger or owner of the goods has notice of such regulation;" citing *Butler v. Railroad Co.*, 3 E. D. Smith, 571, and other cases. See, also, 2 Wait Act. & Def. 82.

"Doubtless," said Mitchell, J., "if the carrier had actual notice of the nature of the property, and still received it as baggage, he would be liable." *Haines v. Railway Co.*, 29 Minn. 161; 12 N.

W. Rep'r, 447. So, in *Railway Co. v. Capps*, 16 Amer. & Eng. R. Cas. 118, it was held that where a railroad company, through its baggage or ticket agent, receives articles for transportation as baggage, knowing at the time that such articles are not properly baggage, the company will be responsible therefor as a common carrier, and will be estopped from denying that the same was baggage. *Railroad Co. v. Conklin* (Kans.), 3 Pac. Rep'r, 762; *Minter v. Railroad Co.*, 41 Mo. 503. Again, in *Hoeger v. Railway Co.*, 63 Wis. 100; 23 N. W. Rep'r, 435, a traveling agent applied to a railroad company to transport his sample trunks as baggage, and the company, knowing their contents, received and checked them as baggage, and carried them as such on the passenger train on which he rode, and the court held that both parties were estopped to claim that such trunks were not baggage, and to be treated as such, and not as ordinary freight. So that, while the obligation of a carrier of passengers is limited to ordinary baggage, yet if it knowingly permits a passenger, either on payment or without payment of an extra charge, to take articles as personal baggage which are not properly such, it will be liable for their loss or destruction, though without fault. Now, the issue invites and the instruction indicates that there was evidence tending to prove that the contents of the trunks were fully advertised, and that the agent of the defendant knew that they contained, besides personal apparel, stage costumes and properties, and that they were received and checked as baggage; and in such case the defendant is liable for their loss, though without fault, as the jury have found by their verdict, and the court affirmed by its judgment. In this view there is no inconsistency in the general verdict with the special findings, and the judgment must be affirmed.*

1. *Common carriers — liability for merchandise received as baggage.*—If a common carrier of passengers accepts merchandise as baggage, knowing or having reason to know, that it is merchandise, it will be liable for it as baggage. *Hannibal, etc., R. Co. v. Swift*, 12 Wall. 262; *Chicago, etc., R. Co. v. Conklin*, 32 Kans. 55; *Haines v. Railway Co.*, 29 Minn. 160; but see *Alling v. Railroad Co.*, 126 Mass. 121; *Blumanth v. Railroad Co.*, 127 Mass. 322.

2. *Liability for lost baggage — connecting lines.*—In a joint action against three railroad companies, operating connecting lines, to recover for baggage lost at some unknown point on their lines, the evidence showed that plaintiff purchased for a single fare from another company, a common agent of defendants, a through ticket over its own and defendants' lines, with cou-

* Reported in 26 Pac. Rep'r, 230.

pons attached, on each of which were the initials of all of defendants; that when plaintiff reached the end of the line of the initial company, which had expressly limited its liability to such injuries as might occur to plaintiff's baggage while on its own line, she received from the next company a through check for her baggage over all of defendants' lines, and was charged for extra weight; that the baggage was carried through to the end of the journey on the same train with plaintiff. Held, that the evidence was sufficient to authorize a finding that defendants jointly undertook to carry the baggage safely through to the end of the journey. *Peterson v. Chicago, etc., R. Co.*, 80 Iowa, 92; 45 N. W. Rep'r, 578.

3. **Connecting lines.—Limiting Liability.**—Where a ticket is sold by a railroad company for a continuous passage over its own line, and thence over the lines of other companies, to the destination, the initial company may, by a stipulation in the contract of carriage, limit its liability for injury to baggage to such injury as may occur on its own line. *Id.*

BENNETT V. AMERICAN EXPRESS CO.

(Supreme Judicial Court of Maine, March 24, 1891.)

1. **CARRIERS. LOSS OF GOODS. PRIMA FACIE CASE.** Ownership of property by the plaintiff, its delivery to and acceptance by a common carrier for transportation, and its non-delivery to the consignee, are *prima facie* evidence of negligence. The burden then rests upon the carrier to show facts exempting it from liability.

2. **SEIZURE OF GOODS IN TRANSITU BY OFFICER WITHOUT PROCESS. LIABILITY OF CARRIER.** The property of the plaintiff, while lawfully in the possession of the defendant as a common carrier, was seized unlawfully by an officer, without any warrant or legal process, nor was any afterward obtained. Held, that the officer was a trespasser, and that the common carrier was liable in the same manner as if it had allowed any other trespasser to take the property out of its custody.

3. **GAME LAWS. CONSTRUCTION.** Revised Statutes, chapter 30, section 12, which impose a penalty for killing, destroying or having in possession, during certain portions of the year, "more than one moose, two caribou or three deer," does not apply to common carriers in the performance of their duties.

4. **INTERSTATE COMMERCE.** When property is rightfully delivered to a common carrier to be transported to a point outside the limits of the state, the duty of the carrier is not merely to transport the property in the state, but to such point outside the limits in another state.

5. Where such property has lawfully commenced to move as an article of commerce from one state to another, that moment it becomes the subject of interstate commerce, and, as such, is subject only to national regulation.

RESERVED case from supreme judicial court, Penobscot county. This was an action on the case to recover the value of the saddles of three deer. Plea, general issue.

F. J. Whiting for plaintiff. *Barker, Voss & Barker* for defendants.

FOSTER, J. It is undisputed that the plaintiff was lawfully possessed and the owner of the saddles of three deer, which were legally killed under the laws of this state; that the same were closely boxed in good condition for shipment and delivered by the plaintiff onto the platform of the Maine Central Railroad Company at Newport station, plainly marked to the consignees in Boston. The defendants' agent was notified that the box was left for transportation, and thereupon he delivered it into the defendants' car, on the arrival of the train, but no receipt or bill of lading was ever given to the plaintiff. Upon the arrival of the train at Augusta, the saddles were seized by a game-warden, and by him removed from the defendants' car, without any search-warrant or other legal process, and without objections from the defendant company or their agents, and have never since been delivered either to the consignees or the express company.

Upon the facts thus stated, the defendants' liability is fully established. The plaintiff's ownership of the property, its delivery to the defendants for transportation, and their acceptance for that purpose, and its non-delivery to the consignees, are *prima facie* evidence of negligence. The burden is, therefore, upon the defendants to show facts exempting them from liability. *Little v. Railroad Co.*, 66 Me. 241.

The property of the plaintiff while in the hands of the defendants as common carriers, *in transitu*, was seized by an officer without any warrant or other legal process. Nor does it appear that any was ever obtained. The officer was, therefore, a mere trespasser, and the defendants were liable, under the rule of the common law, in the same manner as if they had allowed any other trespasser to take the property out of their custody. *Edwards v. Transit Co.*, 104 Mass. 163. As against the plaintiff, the seizure was of no more validity than a trespass by an unofficial person. There has never been any adjudication from any tribunal that the property seized was contraband, or other than the lawful property of the plaintiff. The common carrier is not relieved from the fulfillment of his contract, or his liability as such carrier, any more than if the loss had occurred from fire, theft, robbery or accident. He stands in the relation of insurer, where, as in this case,

no special contract is shown, and upon grounds of public policy is liable for all losses resulting from accident, trespass, theft or any kind of unlawful disposition of the property intrusted to him to carry, excepting only such as arise by the act of God or public enemies. *Adams v. Scott*, 104 Mass. 186; *Kiff v. Railway Co.*, 117 Mass. 593; *Fillebrown v. Railway Co.*, 55 Me. 462.

In the case of *Edwards v. Transit Co.*, *supra*, it was held that, while the carrier was not liable in trover for conversion of the property, he was nevertheless liable on his contract or obligations as common carrier, where the officer seizing the property was a trespasser. "The owner may, it is true," say the court, "maintain trover against the officer, who took the property from the carrier; but he is not obliged to resort to him for his remedy. He may proceed directly against the carrier upon his contract, and leave the carrier to pursue the property in the hands of those who have wrongfully taken it from him."

But the defendants claim exemption from liability in this action on the ground that the property was put into their possession fraudulently; that having had in their possession, and transported during the year, after the 1st day of October, and before the time when this property was delivered to them, three deer from Newport station, to places beyond the limits of the state, they directed their agents not to receive for transportation any deer or parts thereof, and that this fact was known by report to the plaintiff before he delivered the box to the defendants' agent.

Notwithstanding these facts may all be true, they constitute no defense to this action. The statute invoked by the defendants (Rev. Stat., chap. 30, § 12) is as follows: "Whoever kills, destroys or has in possession between the 1st days of October and January more than one moose, two caribou, or three deer forfeits \$100 for every moose, and \$40 for every caribou or deer, killed, destroyed or in possession in excess of said number; and all such moose, caribou or deer, or the carcasses or parts thereof, are forfeited to the prosecutor. Whoever has in possession, except alive, more than the aforesaid number of moose, deer or caribou, or parts thereof, shall be deemed to have killed or destroyed them in violation of law."

The defendants claim that under this statute they could not

lawfully take any more deer, or parts thereof, into their possession for transportation before the following January.

But we cannot adopt such a construction of this statute as would make it apply to common carriers. Such construction as claimed by the defendants would make it unlawful for the carrier to transport, between the 1st days of October and January, the carcasses of moose, caribou or deer lawfully killed before the 1st day of October. Laying aside all constitutional questions, for the present, in relation to the doctrine of interstate commerce, it is sufficient to say that it was not the intention of the legislature so to apply it. The statute, like many others, may in general terms be broad enough to embrace corporations as well as natural persons within its prohibition. But its construction must be such as was evidently intended by the legislature. That intention, to some extent, may be ascertained by taking into consideration the evil sought to be remedied. Such was the decision of this court in its construction of the section following the one now under consideration. *Allen v. Young*, 76 Me. 80. In that case it was held that the transportation of the hide or the carcass of a deer from place to place in this state is not unlawful if the deer was killed at a time when it was lawful to do so, notwithstanding the statute in express terms provides that whoever carries or transports from place to place the carcass or hide of any such animal, or any part thereof, during the period in which the killing of such animal is prohibited, shall forfeit the sum of \$40. Certainly that language is as broad, comprehensive and imperative as that of the statute invoked in this case. Yet the court aptly remarked that it could see no possible motive for making such transportation a crime. To the same effect was the decision in *State v. Beal*, 75 Me. 289. "The meaning of the legislature may be extended beyond the precise words used in the law, from the reason or motive upon which the legislature proceeded, from the end in view, or the purpose which was designed." *U. S. v. Freeman*, 3 How. 557, 565; *Holmes v. Paris*, 75 Me. 559, and authorities there cited.

The box was delivered to and received by the company. No information was asked concerning its contents, and none given. If the plaintiff knew by report, when he delivered the property to the defendants, that their agents had been directed not to receive any deer or parts thereof, yet there was no limitation of the com-

pany's responsibility by special contract, or such knowledge brought home to this plaintiff and assented to by him as would be necessary to limit such responsibility. *Fillebrown v. Railway Co.*, 55 Me. 462. "A carrier may limit his responsibility for property intrusted to him," says Bigelow, C. J., in *Buckland v. Express Co.*, 97 Mass. 125, "by a notice containing reasonable and suitable restrictions, if brought home to the owner of goods delivered for transportation, and assented to clearly and unequivocally by him. It is also settled that assent is not necessarily to be inferred from the mere fact that knowledge of such notice on the part of the owner or consignee of goods is shown. The evidence must go further, and be sufficient to show that the terms on which the carrier proposed to carry the goods were adopted as the contract between the parties, according to which the service of the carrier was to be rendered."

It is undoubtedly the right of the carrier to require good faith on the part of those who deliver goods to be carried, or enter into contracts with him. The degree of care to be exercised, as well as the amount of compensation for the carriage of property, depends largely on its nature and value; and no fraud or deception should be used which would mislead the carrier as to the extent of his duties or the risks which he assumes. But we fail to see any such evidence of fraud or deception in this case as would exonerate these defendants.

This property was lawfully the property of the plaintiff. It was delivered to and accepted by the defendant company for transportation to a point beyond the limits of this state. Their liability as common carriers held them to a strict fulfillment of their obligation in relation to the property in their charge. That obligation was not merely to transport the property in this state, but to a point outside of its limits in another state. It had lawfully commenced to move as an article of commerce from one state to another. From that moment it became the subject of interstate commerce, and, as such, was subject only to national regulation, and not to the police power of the state. The same is unquestionably true in relation to whatever agency or instrumentality may be used as the means of transporting such commodities as may lawfully become the subject of purchase, sale or exchange under the commerce clause of the constitution of the United States.

The transportation of the subject of interstate commerce, where it is such as may lawfully be purchased, sold or exchanged, is without doubt a constituent of commerce itself, and is protected by and subject only to the regulation of congress. The *Daniel Ball*, 10 Wall. 557, 565; *Bowman v. Railway Co.*, 125 U. S. 465, 485; 8 Sup. Ct. Rep'r, 689, 1062; *County of Mobile v. Kimball*, 102 U. S. 691; *Welton v. Missouri*, 91 U. S. 275; *Coe v. Erroll*, 116 U. S. 517; 6 Sup. Ct. Rep'r, 475; *Leisy v. Hardin*, 135 U. S. 100; 10 Sup. Ct. Rep'r, 681.

Defendants to be defaulted, damages to be assessed at *nisi prius*.

Peters, C. J., and Libbey, Emery, Haskell and Whitehouse, JJ., concur.*

CARRIERS OF FREIGHT—RECENT DECISIONS.

1. *Receipt by consignee subject to explanation.* — A statement in a receipt for goods signed by the consignee that the goods were delivered to him by the carrier in good condition is a mere admission, and is not conclusive. *Missouri Pac. Ry. Co. v. Fennell*, 79 Tex. 448; 15 S. W. Rep'r, 693.

2. *Requiring prepayment of freight—statute construed.* — Under the Code of North Carolina, section 1963, providing that common carriers may require prepayment of freight in all cases, a railroad company may lawfully refuse to receive freight offered by another railway company without prepayment, though it does not demand prepayment of others. *Randall v. Richmond, etc.*, R. Co., 106 N. C. 612; 18 S. E. Rep'r, 187.

3. *Delay in transporting—presumption of negligence.* — In a suit against a railway company for damages caused to a car-load of onions by delay in transporting them sixty-four miles, the fact that four days were consumed therein was sufficient to justify a finding of negligence, when there was no evidence as to the number of transfers necessary. *St. Clair v. Chicago, etc.*, R. Co., 89 Iowa, 804; 45 N. W. Rep'r, 570. It appearing that the onions were in good condition when placed in the car, and by reason of heating were worthless when the car reached its destination, the jury was justified in finding that the damage was caused by the delay. *Ibid*.

4. *Connecting lines—through contract—evidence.* — Where a railroad company receives freight to be forwarded to a point not on its line, the fact that it requires from the shipper a guaranty of payment of through freight is not conclusive that it undertakes the responsibility of delivering the goods at the point of destination. *Illinois Central R. Co. v. Kerr*, 68 Miss. 14; 8 So. Rep'r, 830.

5. *Connecting lines—duties and liabilities.* — Where the last carrier is not a party to any special contract for the entire transit, it is not liable for loss or damage to the goods before they were received by it. *East Tenn., etc.*, R. Co. v. *Johnson*, 85 Ga. 497; 11 S. E. Rep'r, 809. Nor is it bound by a contract for

* Reported in 22 Atl. Rep'r, 159.

special rates made by the initial carrier of which it has no notice. *Georgia R. Co. v. Murray*, 85 Ga. 843; 11 S. E. Rep'r, 779.

In an action for failure to deliver goods at their destination on a connecting line, for which goods defendant railroad company issued a bill of lading, limiting its liability to damages occurring while the goods were under its control, it is proper to refuse to direct a verdict for defendant where the evidence fails to show that the goods were delivered safely to the connecting line. *Georgia Pac. Ry. Co. v. Hughout*, 90 Ala. 36; 8 So. Rep'r, 62.

6. *Exemption from loss by fire — burden of proof.* — Under a bill of lading providing that the carrier shall not be liable for loss or damage by fire the burden of proof is on the carrier not only to show that the cause of loss was within the exception, but also that there was no negligence on its part. *Missouri Pac. Ry. Co. v. China Manuf. Co.*, 79 Tex. 26; 14 S. W. Rep'r, 785.

7. *Damage to goods — prima facie evidence of negligence.* — When it is shown that goods were sound and carefully packed when delivered to the carrier, the fact that they arrive in a damaged condition is *prima facie* evidence of negligence. *Phoenix Clay-Pot Works v. Pittsburgh, etc., R. Co.*, 139 Penn. St. 284; 20 Atl. Rep'r, 1058.

8. *Car blown from track — destruction of goods — act of God.* — In an action against a railroad company to recover the value of an express package, it appeared that the express-car, with three others, was blown from the track by a gale, into such a position that all the goods must have been thrown into one corner at the top; that the car was immediately set on fire by coals from the stove, and burned so rapidly that the messenger escaped with difficulty; and that the wind was so fierce as to make it almost impossible to stand or walk, and the air so full of dust that one could scarcely see. Held sufficient evidence to support a finding that the proximate cause was the "act of God," and not the failure of the company to remove the goods after car was overturned. *Bythe v. Denver, etc., R. Co.*, 15 Col. 333; 25 Pac. Rep'r, 702.

9. *Loss of goods — settlement with consignee.* — In case of unqualified consignment of property, the carrier has the right to assume that the consignee is the owner, and to settle a claim for damages for the non-delivery of property, with him. *Scammon v. Wells, Fargo & Co.*, 84 Cal. 311; 24 Pac. Rep'r, 284.

10. *Delivery where no station on side track.* — A car-load of bricks was consigned to plaintiff at "Cloverfield Sta." There was no station agent or side track there, and no one was upon the ground to receive the bricks. After waiting a few minutes, during which the locomotive whistle was repeatedly sounded, the car was carried to a station a mile beyond, and left upon a side track. Held that, since the loaded car could not be left upon the track, it was the duty of the company to unload and leave the bricks upon the ground, and the freight having been prepaid, plaintiff was entitled to recover their value. *Louisville, etc., R. Co. v. Gilmer*, 89 Ala. 534; 7 So. Rep'r, 654.

11. *Title of consignee — holding goods for prior freight — charges against consignor.* — Where goods are consigned generally to the consignee without any particular place of delivery being designated, the title of the consignor passes upon delivery to the carrier. In such case, the carrier cannot, by an agreement in the bill of lading, acquire the right to hold the goods for prior freight charges against the consignor as well as for those on such goods. *Bacharach v. Chester Freight Line*, 188 Penn. St. 414; 19 Atl. Rep'r, 409.

CROWDER ET AL. V. TOWN OF SULLIVAN ET AL.

(Supreme Court of Indiana, June 12, 1891.)

1. MUNICIPAL CORPORATIONS. LIGHT CONTRACT FOR A TERM OF YEARS. CREATING DEBT IN EXCESS OF LIMIT. A contract between a city and a private corporation, whereby the latter agrees to supply the city with light for a specified number of years at a certain price per year, does not create a debt for the sum of all the annual payments, within the meaning of the statutory limitation on municipal indebtedness, since the payment for each year does not become obligatory till the services for that year have been rendered.

2. MODE OF CONTRACTING. NOTICE. In the absence of any statutory provision requiring notice, a city may make a contract for electric light, to be paid for from the corporate treasury without giving any notice.

3. DE FACTO CORPORATIONS. COLLATERAL ATTACK. The existence of a corporation *de facto* cannot be collaterally attacked.

4. GRANTING RIGHT TO USE STREETS FOR LIGHTING. VALIDITY. POLICE POWER. An ordinance granting an electric light company the right to use the city streets, without making such right exclusive, is a mere license, and is valid. Such grant does not preclude the right to grant like privileges to others, nor debar the city from regulating the use of the streets by general ordinance.

A PPEAL from circuit court, Sullivan county, William M. Franklin, special judge.

Humphreys & Wolfe, Beasley & Williams and J. H. Kelley, for appellants. *John T. Hays and Buff & Hays,* for appellees.

ELLIOTT, J. The object of this suit is to enjoin the officers of the town of Sullivan from paying to the Sullivan Electric Light and Power Company compensation for furnishing the town and its citizens with light. The theory upon which the complaint is constructed is that the contract with the company and the ordinance upon which it is founded are void. One of the grounds upon which the validity of the contract is assailed is that it creates an indebtedness beyond the limits prescribed by the statute. The law is against the appellants upon this point. They assume that the contract creates a debt for the aggregate of all the yearly payment, provided for by the contract, and, if this assumption is not valid, their position is untenable. That this assumption is not valid is clear. Where a municipal corporation contracts for a usual and necessary thing, such as water or light, and agrees to pay for it annually as furnished, the contract does not create an indebtedness for the aggregate sum of all the yearly installments,

since the debt for each year does not come into existence until the compensation for each year has been earned. It may be true that the contract creates an obligation, for a breach of which an action for damages will lie, but it does not create a right of action for the unearned compensation. The earning of each year's compensation is essential to the existence of a debt. If municipal corporations cannot contract for a long period of time for such things as light or water, the result would be disastrous; for it is matter of common knowledge that it requires a large outlay of money to provide machinery and appliances for supplying towns and cities with light and water, and that no one will incur the necessary expense for such machinery and appliances if only short periods are allowed to be provided for by contract.

The courts cannot presume that the legislature meant to so cripple the municipalities of the state as to prevent them from securing light upon reasonable terms, and in the ordinary mode in which such a thing as electric light or gas is obtained. But it is unnecessary to discuss this point at greater length, for we regard the law upon it as settled by the adjudged cases. *City of Valparaiso v. Gardner*, 97 Ind. 1, and authorities cited; *City of New Albany v. McCulloch* (Sup. Ct. Ind.), 26 N. E. Rep'r, 1074; *East St. Louis v. East St. Louis, etc., Co.*, 98 Ill. 415; *Appeal of City of Erie*, 91 Penn. St. 398; *Grant v. Davenport*, '36 Iowa, 396; 1 Dill. Mun. Corp. (4th ed.), § 135.

The statute confers upon municipal corporations authority to contract for electric lights, and does not require that notice should be given inviting proposals, nor does it require notice in any form. *Elliott Supp.*, § 794. As the mode of making contracts is committed to the discretion of the municipal authorities and they are not required to give notice, a contract may be awarded without giving notice. *City of Aurora v. Fox*, 78 Ind. 1. If the municipality were endeavoring to levy a specific assessment upon individuals or upon private property, then notice would be required upon general principles; but there is no such attempt here, for the entire compensation is to be paid from the corporate treasury. There is a clear and important difference between cases where a debt is created payable out of general corporate revenues and cases where special assessments are laid upon property. See authorities cited, note 1, *Elliott Roads & S.* 343.

The right of the electric company to exercise corporate functions cannot be collaterally attacked. Where there is a statute authorizing the creation of a corporation, an attempt to comply with the statute, and an actual exercise of corporate functions, the existence of the corporation can only be destroyed by a direct proceeding. *Baker v. Neff*, 73 Ind. 68; *Williamson v. Kokomo, etc., Co.*, 89 Ind. 389.

It is unquestionably true that a municipal corporation cannot grant to a private corporation the exclusive privilege of using its streets for the purpose of supplying the corporation or its citizens with light, water, fuel or the like. *Indianapolis, etc., Co. v. Citizens', etc., Co.* (Sup. Ct. Ind.), 24 N. E. Rep'r, 1054; *Mining Co. v. Town of Elwood*, 114 Ind. 332; 16 N. E. Rep'r, 624. See authorities cited in *Elliott Roads & S.* 332. If the ordinance before us is to be construed as granting an exclusive privilege, it must be adjudged void, in so far, at least, as it attempts to make such a grant. We are, however, quite well satisfied that the ordinance does not attempt to grant an exclusive privilege. It does, it is true, grant a right to use the streets of the town, but it does not exclude their use by competing companies. It does not throttle competition, for it merely grants a license to use the streets. It cannot be held that permission to one company to use the streets excludes others. On the contrary, the grant of such a license leaves plenary power in the municipality to grant licenses to rival companies at any time.

A licensee who obtains a right to use public streets does not obtain a monopoly. The right to grant other licenses remains open and unobstructed. Not only does the right to license other companies remain open, but the right to prescribe reasonable police regulations by a general ordinance also remains unimpaired. This is the effect of the decision in *Mining Co. v. Town of Elwood*, supra. A private corporation that obtains license to use the streets of a municipality takes it subject to the power of the municipality to enact a general ordinance, such as that exercised in enacting police regulations; for a governmental power cannot be surrendered or bartered away, even by express contract. But there is here no attempt to surrender or barter away this governmental power, for there is nothing more than a license to use the streets of the town. The decision in the case of *Mining Co. v. Town of*

Elwood, *supra*, was made upon an ordinance assuming to make a discrimination in favor of one company, and thus exclude all others from using the streets of the town for supplying the citizens with fuel; and it cannot be regarded as denying the right to grant a license to a designated company, although it does deny the power to discriminate in favor of one company to the detriment of competing companies. When a municipality attempts to regulate the mode of using its streets, it must do so by a general ordinance; but it does not follow that a general ordinance is essential to the validity of a license granted to a designated company. It is one thing to specifically license a corporation to lay pipes in a street or construct electric lines, and quite another to regulate the entire subject of supplying light, fuel or the like; for, where the municipal authorities assume to legislate upon the entire subject, a general ordinance is required, but where they simply grant a privilege to use the streets, and do not undertake to regulate the entire subject, a general ordinance is not indispensably necessary to authorize the licensee to use the streets. But neither by a general ordinance nor by special license can discriminations be made or monopolistic privileges be created. It is, however, often true that a privilege is in its nature monopolistic, and, as shown in the case of Indianapolis, *etc.*, *Co. v. Citizens'*, *etc.*, *Co.*, *supra*, when this is so the grant of the privilege is of necessity the grant of monopolistic right; but in such a case the corporate grant does not create the monopoly. See authorities cited, notes 1-3, Elliott Roads & S. 567. In this instance, there is nothing more than the grant of a license. There is no attempt to create exclusive privileges, nor any attempt to regulate the entire subject. The rights acquired under a mere permissive license are subject to control under the delegated governmental power vested in the municipality; for no licensee can acquire rights not subject to regulation under the police power delegated to local governmental instrumentalities. We have here no question of contract rights, for the question presented by the record is whether a special ordinance granting a permissive license to a designated corporation is effective. Judgment affirmed.*

* Reported in 28 N. E. Rep'r, 94; 128 Ind. 486.

590 ELYTON LAND CO. v. BIRMINGHAM WAREHOUSE & EL. CO.

Municipal corporations — incurring debt in violation of constitution.—The constitution of Georgia provides that a debt cannot be incurred by a town, without the approval of two-thirds of the voters thereof. In *Lott v. Mayor, etc.*, of Waycross, 84 Ga. 681; 11 S. E. Rep'r, 558, it was held that the making of a contract for lighting the town for ten years, by the terms of which \$2,000 was to be paid annually in monthly installments did not create a debt within the meaning of the constitution.

ELYTON LAND CO. v. BIRMINGHAM WAREHOUSE & ELEVATOR CO.

(Supreme Court of Alabama, May 1, 1891.)

1. **CORPORATIONS. LIABILITY UPON STOCK ISSUED FOR PROPERTY AT AN EXCESSIVE VALUATION.** The individual defendants organized a corporation with a capital stock of \$250,000, and subscribed for the whole amount. In payment of their subscription they transferred to the company, without actual fraud, a bond for title for land, for which they had paid only \$5,000. For the balance of the purchase-money (about \$50,000) the company executed its notes. The land was worth no more than was paid for it. Held, that under the constitution of Alabama, article 14, section 6, prohibiting the issue of stock except for money or property actually received, and the Code of Alabama, 1876, section 1805, requiring all stock subscriptions to be paid in money, or in labor or property at its money value, defendants are liable to creditors of the corporation to the extent of the difference between the value of the property and the amount of their subscription.

2. Plaintiff cannot be presumed to have had knowledge of the manner in which the stock was paid for by the fact that it was the vendor of the land to the individual defendants and took notes for the deferred payments from the defendant corporation.

A PPEAL from chancery court, Jefferson county, Thomas Cobbs, chancellor.

Alex. T. London for appellant. *Garrett & Underwood* for appellee.

WALKER, J. The bill was filed by the Elyton Land Company as a judgment creditor of the Birmingham Warehouse and Elevator Company, a corporation, and its purpose is to secure the payment of the judgment by the enforcement of the alleged unsatisfied liability of the individual defendants as original subscribers to the stock of the defendant corporation. It is averred that said individual defendants pretend that they have discharged and satisfied their liability as such subscribers, but is alleged that the transaction whereby it was attempted to discharge that lia-

bility is merely colorable, and is void as against the creditors of said corporation, and that said subscribers are liable to pay in money the amount of their said subscriptions, or so much thereof as is necessary to satisfy said judgment. The following is the substance of the case stated by the bill :

On the 9th day of March, 1887, the Elyton Land Company executed and delivered to defendant J. A. Van Hoose, as trustee for the Birmingham Warehouse and Elevator Company, a corporation then in process of organization, its bond of title for two blocks of land near the city of Birmingham, to be paid for at the price of \$53,000. Said Van Hoose paid to the Elyton Land Company \$5,000 on the execution and delivery of the bond for title, by the terms of which it was provided that he was to execute a transfer and conveyance of his rights and interests thereunder to the Birmingham Warehouse and Elevator Company, upon its organization, and that that company should make its nine notes for the balance of the purchase-money to the Elyton Land Company, said notes to be each for \$5,333.33, bearing interest from August 20, 1886, payable, respectively, at one, two, three, four, five, six, seven, eight, and nine years from that date. On the 19th day of February, 1887, said Van Hoose and the other individual defendants Johnston, Sage and McLester filed their petition in the office of the probate judge of Jefferson county for the organization as a corporation of the Birmingham Warehouse and Elevator Company, the capital stock of which was to be fixed at \$250,000, to be divided into two thousand five hundred shares of \$100 each. On the same day a commission was issued to said Van Hoose, Johnston, Sage and McLester, constituting them a board of corporators, and authorizing them to open books of subscription to the capital stock of the proposed corporation. On the 11th day of March, 1887, said board of corporators, over their signatures, reported and certified to said probate judge that on the 9th day of March, 1887, they had opened books of subscription to the stock of said proposed corporation, and that they had each subscribed for five hundred shares, "subscribed through James A. Van Hoose, trustee for the subscribers, and payable in real property near the city of Birmingham, * * * of the money value stated in said subscription of \$250,133.33, subject to the unpaid purchase-money due to the Elyton Land Company, amounting to \$50,133.33, the

payment of which is to be assumed by said company, said lands being fully described in the bond for titles of the Elyton Land Company to said James A. Van Hoose, trustee, dated March 9, 1887, which said trustee is to convey to said company in payment of said two thousand shares of stock," and Van Hoose, Johnston and McLester each subscribed for one share, payable in money. Said corporators further reported that on the organization of said company said Van Hoose, Johnston, Sage and McLester were present, and each represented in person five hundred and one shares in stock; that each of said persons was elected a director of said corporation, and that the board of directors elected Van Hoose as president and McLester as treasurer and secretary of the corporation. It was further reported and certified by the corporators that on the 10th day of March, 1887, after the organization of said company, all the capital stock thereof payable in money was paid to the treasurer, and all the property subscribed was delivered to him.

The subscriptions were made as reported, and certified by the corporators. It was not true at the time of the filing of the bill, or when the subscriptions were made and reported, that said land was of the money value of \$200,000. The price named in said bond for title — \$53,000 — was at the time of said subscriptions the full money value of said land when sold on long credit. Said Van Hoose, Johnston, Sage and McLester well knew that said land was not worth, nor was it of the money value of \$200,000, or any thing near that sum. After said subscriptions were made, and after said Birmingham Warehouse and Elevator Company was organized, said Van Hoose indorsed to it said bond for title, and said company executed its nine promissory notes, as by the terms of the bond for title it was provided it should do; and said Van Hoose, Johnston, Sage and McLester now claim that the assignment of said bond was a discharge and satisfaction of said subscription of \$200,000, which has not been otherwise paid. It is this transaction which the bill alleges is merely colorable and is void as against the creditors of said corporation. Only \$5,000 has been paid on account of said purchase-money. The Elyton Land Company has recovered judgment against said Birmingham Warehouse and Elevator Company on two of said notes. That judgment remains unsatisfied, and said corporation has no property out of which it could be satisfied by execution.

Each of the individual defendants demurred to the bill upon the following, among other grounds: (1) That the bill on its face shows that the complainant has no right to the relief therein prayed because it shows that this defendant owes nothing to the Birmingham Warehouse and Elevator Company, either in unpaid subscriptions for stock or otherwise; (2) because said bill alleges no facts which render this defendant liable personally in any way for the alleged debt mentioned therein as due from said Birmingham Warehouse and Elevator Company to the complainant; and (3) because said bill shows that this defendant subscribed for stock in said Birmingham Warehouse and Elevator Company, payable in property, at a valuation mentioned in said subscription, which property has been delivered and received in full payment for said stock; and said bill fails to show that said property was overvalued unreasonably, intentionally and fraudulently, or that the defendant has made a profit from the stock so subscribed and taken by him. A decree was rendered sustaining the demurrers as to the grounds here mentioned. The appeal is from that decree.

On the averments of the bill it is to be taken as true that the property which was received by the corporation as full payment of the stock subscription was worth only \$5,000, the amount which had been paid on the bond for title. It follows that the decree of the chancery court involves the assertion of the validity as against the creditors of the corporation of the payment of a stock subscription of \$200,000 by the transfer to the corporation of property worth only \$5,000. In reviewing this determination regard is to be had to certain constitutional and statutory provisions, which are to be construed and applied in the light of settled principles governing the relations of stockholders to the corporation of which they are members, and to the creditors thereof. By the constitution of 1875 it was provided that "no corporation shall issue stock or bonds, except for money, labor done or money or property actually received; and all fictitious increase of stock or indebtedness shall be void;" and that "dues from private corporations shall be secured by such means as may be prescribed by law, but in no case shall any stockholder be individually liable otherwise than for the unpaid stock owned by him or her. Const., art. 14, §§ 6, 8. Prior to the adoption of the present constitution each stockholder in any corporation was liable

to the amount of stock held or owned by him, the law imposing a liability not only to the extent that the stock was unpaid, but for an additional sum equal to the amount of such stock. Const. 1868, art. 13, § 3; Rev. Code 1867, § 1760; *McDonnell v. Insurance Co.*, 85 Ala. 401; 5 South. Rep'r, 120. Before the creation of this additional liability the stock and other property of a private corporation was regarded and treated in a court of equity as a trust fund for the payment of the debts of the corporation, and in the event of the insolvency of the corporation, unpaid stock subscriptions could be condemned for the satisfaction of the creditors, and said additional liability was a mere increase of the security for the payment of the corporate debt. *Smith v. Huckabee*, 53 Ala. 191. While corporate creditors were secured by this special liability existing in their favor there was no direct constitutional or general statutory prohibition against the abuse of corporate powers by the issue of stock not in good faith representing the value of money, service or property actually contributed to the corporate enterprise; and the general incorporation law then in force contained no requirements as to the mode of subscribing for stock, or as to how the subscription liability should be satisfied. Code 1867, chaps. 3, 4, tit. 2, pt. 2. The dangers to which corporate creditors were exposed by the absence of such regulations were obviated by the provisions for said additional liability. When those provisions were repealed by the constitution of 1875 there was an obvious necessity of providing that the trust fund, the remaining security for corporate creditors, should exist as a thing of substance, and that the liability for unpaid stock should not be merely illusory. This necessity was not overlooked. The former legislative policy of securing corporate creditors by making the stockholders liable to them in amounts over and above what they could be called upon to pay on their stock subscriptions gave place to a new policy, the aim of which was to afford proper security to persons dealing with corporations by prohibiting the issue of stock except for value received by the corporation, and by providing definite regulations for the payment of stock subscriptions in money, or in labor or property at its money value.

This new policy is evidenced generally by section 6, article 14, of the constitution, quoted above, and particularly as to manufacturing, mining, immigration and industrial business corpora-

tions, by section 1805 of the Code of 1876, which provides that "all subscriptions to the capital stock of any company organized or proposed to be organized under the provisions of this article shall be made payable in money, or in labor or property at its money value, to be named in the list of subscription; and in case of a failure to perform the labor, or deliver the property, according to the terms of the subscription, the money value thereof as named in the list of subscription shall be paid by the subscribers." These enactments are not for the benefit of corporate creditors alone. The policy evidenced thereby bears upon the relations of corporations to the public and upon the relations of stockholders to each other, to the corporation and to its creditors.

This court has not heretofore had occasion to pass upon the question as to the effect of these provisions upon the rights of corporate creditors. The effective operation of the constitutional provision in other connections has been recognized in several cases. In *Fitzpatrick v. Publishing Co.*, 83 Ala. 604; 2 South. Rep'r, 727, it was held, at the instance of an objecting stockholder, that under the constitutional and statutory provisions a corporation with a paid-up capital of \$10,000 has no authority to double its capital stock and distribute the new stock among its stockholders as a stock dividend, on the mere statement that its capital stock "has been invested in property which has more than doubled in value, and is now worth \$20,000 over and above all liabilities;" and an injunction was issued to restrain and enjoin the corporation from carrying into effect a resolution which had been adopted by the stockholders for the issue and distribution of such new stock. In the course of the opinion it was said: "Let us not, by timid interpretation, impair the strength of this bulwark, erected by our constitution-makers against the frauds which have become the reproach of the age we live in." In *Williams v. Evans*, 87 Ala. 725; 6 South. Rep'r, 702, it was held that relief could not be granted on an executory contract, to pay for the transfer of a subscriber's right under a stock subscription whereby it was provided that the corporation to be formed should issue "\$5 of stock for \$1 subscription." The stock had not been issued when the contract in suit was made. The court said: "A contract which contemplates the violation of a statute or a constitution as a mode of executing such contract, is illegal and void. *

* * One of the purposes of this clause of the constitution was to protect the public, as well as stockholders, against spurious and worthless stock by the process of watering; in other words, from fraudulently issuing and putting on the market fictitious corporate stock, which is based on nothing valuable as a consideration for its issue. It is greatly to the interest of the public that the policy of this provision should be enforced."

In *Parson v. Joseph*, decided during the present term, and reported in 8 South. Rep'r, 788, the bill, to which a demurrer was overruled, was filed by a stockholder to secure the cancellation of certain certificates of stock issued to another stockholder, on the ground that the stock so issued was fictitious, and that its issue was in violation of the constitution and the statute law of the state. It was alleged that certain stock was paid for in full by conveying to the company thirty-nine acres of land at an agreed price and valuation of \$137 per acre, when the land was not worth more than \$25 per acre; that afterward the capital stock of the company was doubled, and without further consideration than the thirty-nine acres of land the amount of stock issued therefor was doubled. The contention was in regard to this latter issue of stock. It was alleged that the excessive valuation of the land was made knowingly, willfully and with the fraudulent intent of having the fictitious stock in question issued in violation of law. On these averments it was held that the stock in question was issued in violation of section 1662 of the Code of 1886, and of section 6, article 14, of the constitution. It is to be observed that the respective requirements of section 1805 of the Code of 1876 and section 1662 of the Code of 1886, as to how stock subscriptions shall be payable, differ in this: that the former requires the subscriptions to be made payable in money, or in labor or property at its money value, to be named in the list of subscription; while the latter provides that all subscriptions must be payable in money; but the commissioners may receive subscriptions payable in money, the subscriber having the privilege of discharging the same by the rendition of stipulated necessary services, or the performance of stipulated necessary labor for the corporation, at the reasonable value of such services or labor, or in property at the reasonable value thereof. It does not seem, however, that the variations in the terms of these two

statutes are such that the fact that the stock subscription was made under the one or the other of them would make any substantial difference in the right of a stockholder to object to the issue of other stock representing property received by the corporation at an excessive and fraudulent over-valuation. In the case last cited it was suggested that stockholders who knowingly and intentionally have subscribed and paid for stock with property upon a fictitious valuation are liable to creditors as stockholders who have not paid up in full for their stock; but the question of such liability was not presented in that case. In *Tutwiler v. Land Co.*, 89 Ala. 391; 7 South. Rep'r, 398, several questions that might arise from the issue of stock for property taken at a palpably excessive valuation were stated, but not decided. It is plain from this review of the decisions that the constitutional and statutory provisions in question are treated as effectual to prevent the courts from lending their aid for the enforcement of any contract or obligation the execution of which involves a disregard of those regulations, and that, so far as they are appropriate for the protection of stockholders from improper discriminations in accepting payments for stock, those regulations are accorded such effect and operation as to fully accomplish this purpose of their enactment. It cannot be doubted that the protection of the interests of corporate creditors is as much within the aim and policy of those regulations as were the objects in behalf of which they have been successfully invoked in this court.

In considering the claim of corporate creditors to hold the stockholders of the corporation individually liable on the ground that an attempt by them to satisfy their stock subscriptions by the transfer to the corporation of property at a gross over-valuation was not such payment as the law requires, the fact is not to be lost sight of that the solution of the question is dependent in some measure, at least, upon the constitutional and statutory provisions which the court has already construed as amply effectual to secure the accomplishment of other objects, also within the purview of the enactments; and it may be added that a like beneficial operation should be accorded to these provisions when invoked in furtherance of either of their manifest purposes. It is impossible to reconcile the decisions of the various courts upon the question of the liability to the creditors of the corporation of

stockholders on stock issued for property taken at an over-valuation. We will briefly consider the cases principally relied on in support of the proposition that such liability cannot be maintained. In *Coit v. Amalgamating Co.*, 119 U. S. 343; 7 Sup. Ct. Rep'r, 231, the liability was claimed on the ground that the stock was paid for in property at a valuation illegally and fraudulently made at an amount far above its actual value. The court found that this claim was not sustained by the evidence. It was said in the opinion: "The corporators may have placed too high an estimate upon the property, but the court below finds that its valuation was honestly and fairly made; and there is only one item — the value of the charter privileges — which is at all liable to any legal objection. But, if that were deducted, the remaining amount would be so near the aggregate capital that no implication could be raised against the entire good faith of the parties in the transaction." It is plain that this case is not an authority against the existence of the liability contended for by appellant. In *Brant v. Ehlen*, 59 Md. 1, there was no assertion of the absence of such liability. It was expressly stated in the opinion that the questions presented were dealt with upon the assumption that the sale and purchase of the land which was paid for in stock were made in good faith.

Another case, decided subsequently, and reported in the same volume — *Crawford v. Rohrer*, 59 Md. 599 — shows clearly the rule prevailing in that state on the subject under consideration. In that case it was decided that "any arrangement among stockholders, or those in charge of the affairs of the corporation, by which the stock is but nominally paid for, whether in money or property, the corporation not in fact getting the benefit of the price in good faith, will be regarded as a sham, and not as a valid payment, as against the creditors of the corporation, however it may be regarded as between the corporation and the subscriber." In *Carr v. Le Fevre*, 27 Penn. St. 413, a stockholder was sought to be charged on stock which had been paid for in land. It was said in the opinion: "There is nothing in the special verdict tending to show that there was any fraud in this transaction;" and that "the parties took the precaution to have the lands valued and appraised. We are bound to presume that this was fairly done." The element of gross over-valuation was lacking in that

case. In this particular it was like the Alabama case of *Davis v. Chemical Co.*, decided during the present term, and reported in 8 South. Rep'r, 496. In *Van Cott v. Van Brunt*, 82 N. Y. 535, it appeared that stock and bonds of a railroad company were issued to a contractor for the building of the road, and that the work done under the contract was of less value than the par of the stock and bonds agreed to be paid therefor. By this arrangement the stock was disposed of in good faith and without fraud, though for less than its face value. It was held that the liability of the stockholder had been discharged. On page 542 of the opinion it is made to appear that the transaction was without the influence of statutes in that state somewhat similar to provisions prevailing here, as will be shown by references to be made to other New York decisions. This case has several times been the subject of unfavorable comment. *Tayl. Priv. Corp.* (2d ed.), § 545, note 5; 2 *Mor. Priv. Corp.*, § 826; *Cook Stocks*, § 47, note 5; *Jackson v. Traer*, 64 Iowa, 483; 20 N. W. Rep'r, 764. *Phelan v. Hazard*, 5 Dill. 45, was a suit by a creditor to charge a transferee of stock, who had purchased the same for value, and in good faith, as full-paid stock. It was said that a liability could not be established against the defendant by showing that the property conveyed to the corporation in payment for the stock was not worth the amount of the stock, or that it was not worth any thing over and above the mortgages upon it at the time of the transfer. The court held that the agreement whereby property was received in payment for the stock was conclusive upon the company and its creditors, until by direct attack it has been impeached and rescinded for fraud; and it was said that "the courts, even where the rights of creditors are involved, will treat that as payment which the parties have agreed should be payment." This case was followed as authority in *Coffin v. Ransdell*, 110 Ind. 417; 11 N. E. Rep'r, 20.

The three cases last cited represent the weight of American authority opposed to the recognition of the liability asserted in the case at bar. It is to be marked that in neither of those cases were any statutory provisions mentioned as having any bearing upon the conclusions reached. It is also to be noted that in the latter two of the three cases English decisions were principally relied on as authority. The opinions in both those cases quote

with approval from *In re Baglan Hall Colliery Co.*, L. R., 5 Ch. App. 346, where it was said, in reference to the right of a creditor to question the payment for stock by a transfer of property at an over-valuation, that "the test to be applied is this: Could the company by any proceeding have set aside the transaction?" The English rule seems to be that the creditor can have no other or greater rights in this regard than the corporation itself could assert. In this country, on the contrary, the best authorities maintain that arrangements to issue stock as full paid, though only partly paid for in fact, may be valid and binding between the company and its stockholders, and yet may be set aside at the instance of creditors, and full payment on the stock enforced for the satisfaction of the debts of the corporation. *Scovill v. Thayer*, 105 U. S. 143; *Curry v. Woodward*, 53 Ala. 371. This latter rule results from the doctrine, well established in America, that the stock subscribed is considered in equity as a trust fund for the payment of creditors. *Wood v. Dummer*, 3 Mason, 308; *Railroad v. Branch*, 59 Ala. 139; *Smith v. Huckabee*, 53 Ala. 191; *Paschall v. Whitsett*, 11 Ala. 472; *Allen v. Railroad Co.*, 11 Ala. 437. This doctrine, first distinctly enunciated in *Wood v. Dummer*, *supra*, does not prevail in England as in this country. *Tayl. Priv. Corp.*, § 658, note 1; *Cook Stocks*, § 42. The absence of the recognition in English cases of this trust feature of a subscription to stock renders them unsafe guides in American courts when dealing with questions relating to the liability of stockholders in reference to the debts of the corporation.

Several cases are cited in support of the contention that the provision of section 6, article 14, of the constitution does not have such effect on the transaction in this case as to leave the stockholders who participated therein still liable for the debts of the corporation. In *Railroad Co. v. Dow*, 120 U. S. 287; 7 Sup. Ct. Rep'r, 482, it was held that a similar provision of the constitution of Arkansas did not authorize a corporation itself to repudiate its liability on \$2,600,000 in bonds and \$1,300,000 in stock, both of which had been issued in payment for property worth only \$1,300,000. This case involves no question of the right of creditors to charge stockholders. As has been already shown, an arrangement which would preclude the corporation from demanding further payment upon stock issued by it would not prevent

creditors from proceeding against the stockholders if the stock has not really been paid for. Nothing is said in that case to indicate that the transaction would have been sustained to the same extent as against the creditors of the corporation. The case is not an authority against the existence of the liability here asserted. The same thing may be said of the case of *Railroad Co. v. Thompson*, 103 Ill. 187, which is cited in the opinion in the case just mentioned. In *Stein v. Howard*, 65 Cal. 616 ; 4 Pac. Rep'r, 662, it was held that an increase of capital stock, under a resolution authorizing the additional shares to be sold at eighty-seven and one-half cents on the dollar, was not such "a fictitious increase of the stock" as was prohibited by a constitutional provision similar to ours. Neither in this case nor in the two cases cited just before it is there any thing in the report to indicate what, if any, statutory regulations prevailed in those states in reference to the mode in which subscriptions to stock in corporations should be made payable.

We will now turn to the principal cases which assert the invalidity as against creditors of attempts to satisfy the liability on stock subscriptions by the transfer of property at a gross overvaluation. In *Jackson v. Traer*, 64 Iowa, 469 ; 20 N. W. Rep'r, 764, the facts were that a railway company had been indebted to a construction company in the sum of \$70,000, which it was unable to pay ; and in satisfaction of the debt it issued to the construction company certificates of stock of the face value of \$350,000, which shares were distributed among the members of the construction company. It was held that such members were to be treated as stockholders who had paid twenty per cent on their stock, the stock held by them being five times greater in amount than the debt for which it was issued, and that they were liable to a creditor of the corporation to the extent of the unpaid eighty per cent of the par value of the stock. To the same effect is *Osgood v. King*, 42 Iowa, 478. In neither of these cases does it appear that the statutes of Iowa require subscriptions to stock to be made payable in any particular mode. The existence of the liability was not made to depend upon a statutory requirement in this regard. By the New York statute governing the organization of corporations for manufacturing purposes it is provided "that the trustees of such companies may in good faith purchase prop-

erty necessary to their business, and issue stock to the amount of the value thereof in payment therefor, and the holders of such stock are exempt from liability for the debts of the corporation." In *Douglass v. Ireland*, 73 N. Y. 100, it appears that the capital stock of a corporation organized under that act to the amount of \$300,000 was issued in consideration of the assignment to the company of executory contracts for the purchase of property found by the jury to be of the value of \$68,000. The defendant acquired his stock with a full knowledge of the facts, having, as a trustee of the corporation, participated in the transaction. He was held liable as a stockholder who had not fully paid up.

The court said: "A deliberate and advised over-valuation of property thus purchased and paid for is a fraud upon the law, and a violation of the condition upon which the exemption of stockholders from liability under the provisions of the statute is made to depend. It is in direct violation of the policy as well as the terms of the law which demands payment, either in money or property at its value, of all the capital stock of the company, as a condition of the immunity to the stockholders from liability for debts of the corporation. The payment of an amount for property in excess of its value deprives creditors and the public of the security contemplated by the statute, and thus a fraud is perpetuated as well upon the law as upon creditors. The fraud is consummated by the issue of stock as full paid under the act of 1853, which has not been fully paid for in value by the property for which it is issued, and it does not depend upon any fraudulent intent other than that which is evidenced by the act of knowingly issuing stock for property to an amount in excess of its value. All that is necessary to establish the legal fraud and take the stock issued out of the immunity assured to stock honestly issued in pursuance of the act of 1853 is to prove two facts: (1) That the stock issued exceeded in amount the value of the property in exchange for which it was issued; and (2) that the trustees deliberately and with knowledge of the real value of the property overvalued it, and paid in stock for it an amount which they knew was in excess of its actual value." The rule laid down in this case is firmly established in New York. *Boynton v. Andrews*, 63 N. Y. 93; *Schenck v. Andrews*, 57 N. Y. 133; *Boynton v. Hatch*, 47 N. Y. 225; *Iron Co. v. Drexel*, 90 N. Y. 87.

A New Jersey statute authorized payment for capital stock to be made "either in money or in land, the land to be appraised by the board of directors, and taken at such value on such terms as may be agreed on." The capital stock of a corporation was fixed at \$100,000, all of which was subscribed for by five persons, who became the directors of the company. Certain lands were purchased for \$50,000, and the deed thereto was made directly to the corporation, which gave its obligations for the whole of the purchase-money. The directors then appraised the lands at \$100,000, and credited \$50,000 of that valuation as a payment of fifty per cent on their stock subscriptions. The lands were not worth more than the original purchase-price. On this state of facts it was held, in *Wetherbee v. Baker*, 35 N. J. Eq. 501, that, as against creditors of the corporation, such allowance of credit on the subscriptions was invalid, and that the stockholders were liable for the whole amount of their subscriptions. In reference to the valuation of the land by the directors, as authorized by the statute above quoted, the court say :

"The directors, in making the appraisement and valuation and dealing with their stock subscriptions, act in a fiduciary capacity, and are bound to discharge the duties of the trust with fidelity. This appraisement, it is manifest, was illusory, and made only in the interest of the directors, who were to profit by it ;" and that "in all such cases transactions under such powers have been upheld only where the contract for the rendition of services or the purchase of property payable in stock has been made in good faith, and the property taken in payment of stock subscriptions has been put in at a fair *bona fide* valuation ; and the courts have inflexibly enforced the rule that payment of stock subscriptions is good as against creditors only where payment has been made in money, or in what may fairly be considered as money's worth." In *Bailey v. Coke Co.*, 69 Penn. St. 334, the facts were that Bailey, with two other persons, on September 29 purchased certain land for \$125,000, and on October 1 following the corporation agreed to take the land at an advance of \$50,000, subject to the whole purchase-money, so that the stock subscription of \$50,000 made by Bailey and the two others should be paid for in full by the agreed advance on the land. The statute provided that "no share shall be issued for less than its par value." It was

held that by such a transaction Bailey did not pay for his stock, and that he was still liable thereon. Rights of creditors were not involved in this case. The transaction was regarded as a fraud on the rights of other stockholders, and as involving a non-compliance with statutory safeguards intended for the protection of the public. The case is not like the Alabama case of *Parson v. Joseph*, *supra*.

The review of the authorities will not be further extended. Discussions of them may be found in *Cook Stocks*, §§ 33-47; 1 *Mor. Priv. Corp.*, §§ 425-429; 2 *Mor. Priv. Corp.*, § 825 et seq.; 2 *Wat. Corp.*, § 188; *Tayl. Priv. Corp.*, §§ 545, 701 et seq. Our examination satisfies us that the weight of American authority does not support the statement made by Mr. Cook, in section 47 of his work on *Stocks and Stockholders*, to the effect that the attempts which have been made, in cases where stock was issued for property taken at an over-valuation, to hold the party receiving such stock liable for its full par value, less the actual value of the property received from him, have been unsuccessful; and that, if there has been an over-valuation, which is shown to have been fraudulent, then the contract is to be treated like other fraudulent contracts, and is to be adopted *in toto* or rescinded *in toto* and set aside. We have found no authority at all asserting the exemption of the stockholder from such liability where it appeared that the stock subscription was governed by a statutory regulation at all similar to section 1805 of the Code of 1876, or section 1662 of the Code of 1886. On the other hand, the New York, New Jersey, Maryland and Pennsylvania decisions which have been cited show that the courts in those states, in giving effect to statutory requirements, certainly no more stringent than ours, as to the mode in which stock subscriptions shall be made payable, do not allow attempted payments in property worth greatly less than the amount of the stock issued therefor to foreclose the just demand of corporate creditors to require that the stock subscriptions be made good in money, or in money's worth, as contemplated by the statutes. Those courts recognize in such provisions safeguards intended for the protection of persons dealing with corporations as well as for the corporations themselves and the persons associated together therein.

Our general laws afford the ablest and freest facilities for per-

sons desiring to engage in almost any kind of lawful venture to secure by corporate association the advantages of defined and limited responsibility, and at the same time the efficient execution of their purposes by means of an artificial being, changes in the membership of which cause no break in the continuity of its action, nor affect its capacity to act, within the scope of its powers, as a natural person. It is plain that such associations, endowed with such powers and privileges, would be a source of danger to persons dealing with them, unless the law required that in their formation suitable provisions be made for a substantial responsibility for such engagements as they may enter into. When legal provisions are found which are appropriately framed to secure the existence of such responsibility, it is not permissible so to construe them as to allow a mere formal and illusory compliance therewith to defeat the objects intended to be accomplished. No argument is needed to show that a requirement that the stock of a corporation shall be paid in money, or in labor or property at its money value, inures to the benefit of persons who may become creditors of the corporation, in that it requires the capital stock to be the representative of substantial values, and insures the existence of a fund which must be within reach for the satisfaction of debts if the affairs of the corporation are managed as contemplated by the law. It is equally clear that if a stock subscription which is required to be made payable in money, or in labor or property at its money value, and is in fact made payable in property at a designated money valuation, may be satisfied by the transfer of property the value of which is insignificant, or merely nominal, as compared with the valuation stated, then, so far as this provision of the law looks to the protection of creditors, it might as well have allowed the subscription to be made payable in "chips and whetstones." Except section 6, article 14, of the constitution, and section 1805 of the Code of 1876, there were not, at the time of the formation of the appellee, in reference to the mode of satisfying stock subscriptions, adequate provisions for the protection of creditors of such corporations. Those enactments are appropriate for this purpose. The requirement of section 1805 of the Code of 1876, that "in case of a failure to perform the labor or deliver the property according to the terms of the subscription, the money value thereof, as named in the lists of sub-

scription, shall be paid by the subscribers," cannot be regarded as providing for a penalty to compel the performance of the labor or the delivery of the property. The evident meaning is that, in the event of such failure, the corporation shall receive the equivalent and no more nor less than the equivalent, in money, or the labor, or the property, as the case may be. This clause of the statute is convincing that the statement of the money value of the property in which the subscription is made payable is a material feature of the contract, and that the property delivered must be of a value to correspond with that named in the subscription.

As affecting the rights of creditors, the statute is simply a definite requirement as to what shall constitute that trust fund to which persons dealing with the corporation have a right to look. The defendants in this case, in making and accepting payments on the stock subscriptions, were acting in a fiduciary capacity in reference to that fund. The performance of the contract of subscription, to be binding on creditors, should have been such as is required in the case of a contract between a trustee and one having knowledge of his trust obligation. In form the stock subscription was such as the statute called for. Under section 2023 of the Code of 1876 and section 8, article 14, of the constitution the stockholders are liable only for the unpaid stock owned by them. But the creditors are entitled to demand that the payment on the stock shall be an actual and *bona fide* discharge of the liability imposed by the contract of subscription. The defendants, in making and accepting payment in property, were bound to exercise their judgment and discretion fairly and honestly directed to secure a substantial compliance with the terms of the contract. In the exercise of that judgment and discretion they are entitled to the benefit of whatever margin there may be for honest differences of opinion in the valuation of the property; but a deliberate and intentional over-valuation of the property is not permissible. The transfer of the property known to be worth only \$5,000 to pay a stock subscription of \$200,000 does not bear the semblance of a compliance with the contract of subscription as to one of the essential terms thereof. The taking of property at a valuation forty times greater than its actual worth, which was known to the parties, shows upon its face the absence of a *bona fide* exercise of judgment and discretion in making the valuation, and an inten-

tional non-compliance with the requirement that the property shall be taken at its money value. The absence of the fraudulent motive on the part of a trustee does not give validity to a mere simulated execution of the trust; and an averment of fraud in reference thereto is unnecessary. The parties beneficially interested in the trust are entitled to a substantial compliance with its terms. They are not bound by an act of mere formal compliance, which really involves their practical exclusion from the benefits intended to be secured to them. The capital stock of a corporation constitutes the basis of its credit, and persons dealing with the corporation have a right to assume that the stock has been actually paid in, or that it may be reached. The transaction whereby payment was attempted to be made, as shown by the averments of the bill in this case, is not binding on creditors, because it did not constitute such a payment as was contemplated by the terms of the contract of subscription, and was in effect a palpable evasion of the requirements of the statute.

It is, however, contended in the argument for appellee, that the appellant, through its officers, knew of the history of the organization of the appellee corporation, and of the mode in which the subscriptions to the stock were to be paid; that in fact it was an active promoter of the whole transaction in advance. It may be that such an unauthorized extinguishment of the subscription liability may not be impeached by one who was actively instrumental in securing the organization of a corporation with a view of making a sale of property to it, and did in fact accept benefit in dealing with the corporation with full knowledge of the arrangement by which the stock was proposed to be paid for. Disability to question a wrongful transaction usually attaches to a party who consented thereto or participated therein. *First Nat. Bank v. Gustin, etc., Mining Co. (Minn.)*, 44 N. W. Rep'r, 198; *Bank v. Alden*, 129 U. S. 372; 9 Sup. Ct. Rep'r, 332; *Parson v. Joseph*, supra; 2 Mor. Priv. Corp., § 829. But the averments of the bill in this case do not show that the appellant participated in or knew of the mode in which the stock subscription was undertaken to be paid. In the absence of averments upon this subject, it is not to be taken for granted that the appellant in making the agreement to convey the land to the corporation when formed, contemplated that the stock in the corporation

should not be paid for as the law directed, or that, in accepting the notes of the corporation, it had such knowledge, and took such part in the furtherance of the acts connected with the transfer of the bond for title for the stock, that it is to be presumed to have dealt with the corporation on the basis of treating its capital stock as fully paid up. We find nothing in the averments of the bill to preclude appellant from asserting the right of a creditor of a corporation to hold stockholders liable for subscriptions to stock not really paid for. The statements of fact in the bill support the conclusion therein averred that the transaction by which payment for the stock was attempted to be made was merely colorable—in other words, that it was not really a payment, but had only the outward appearance, without the substance of payment. Such being the case, the individual defendants are still liable on their stock subscriptions to the extent that the attempted payment falls short of a *bona fide* compliance with the terms of the contract, and the allegations as to excessive over-valuation of the property in question were sufficient under the rules above stated. The chancery court erred in sustaining the demurrers. Reversed and remanded.*

Stock issued for property at an excessive valuation—Liability of holder to corporate creditors.—See *Clark v. Bever*, ante, p. 460, and note; *Handley v. Stutz*, ante, p. 482, and note; *Carter v. Union Printing Co.*, post; *Libbey v. Tobey*, 2 Am. B. R. & Corp. Rep. 281, and note.

SHIPMAN ET AL. V. BANK OF STATE OF NEW YORK.

(Court of Appeals of New York, April 23, 1891.)

1. BANKS AND BANKING. LIABILITY FOR MONEY PAID OUT UPON CHECKS WITH FORGED INDORSEMENTS. A bank is liable to its depositors for money deposited which it has paid out on checks drawn by the depositor, which checks have been stolen by the depositor's clerk, who has forged the indorsement thereon, where it appears that the depositor was guilty of no negligence in the matter, and that the bank paid the checks without inquiry as to the genuineness of the indorsements and in reliance upon the responsibility of the persons presenting them for payment.

2. EFFECT OF RETURN OF CHECKS TO DEPOSITOR WITH PASS-BOOK WRITTEN UP. The fact that such checks were returned to the depositor when his pass book was written up, and were received by him without objection, does not

* Reported in 9 So. Rep'r, 120.

relieve the bank from liability where the failure of the depositor to detect the forgeries was not caused by negligence on his part.

3. CHECKS PAYABLE TO FICTITIOUS PAYEE. CONSTRUCTION OF NEW YORK STATUTE. 1 Revised Statutes of New York, page 768, section 5, which provides that negotiable paper made payable to a fictitious person, and negotiated by the maker, has the same validity, "as against the maker and all persons having knowledge of the facts, as if payable to bearer," does not apply where the maker believes the payee of a check drawn by him to be a real person, and does not intend to have the check go into circulation until it has been indorsed by the payee, but the check is fraudulently negotiated by a third person without fault of the maker.

4. BANK NOT DISCHARGED BECAUSE REAL PAYEES HAVE BEEN REIMBURSED BY FORGER. In an action by a depositor against a bank to recover money deposited, which the bank has paid out on checks having forged indorsements, the fact that the forger has made good the amount of the checks to the payees constitutes no defense, where the money with which he made good the checks was not furnished by the bank, and plaintiff had not profited by such payment, since the action is not founded upon the wrongful payment of the checks, but upon the debt created by the deposit.

A PPEAL from supreme court, general term, first department.

Wm. Allen Butler for appellant. *Elihu Root* for respondents.

O'BRIEN, J. This appeal brings here for review a judgment of over \$223,000, recovered by the plaintiffs against the defendant, upon a state of facts fully found and stated by the referee in his report, and in regard to which there is little, if any, serious dispute between the parties. The form of the action is for the recovery of a sum of money which it is claimed the defendant undertook, when accepting the plaintiffs' deposits, to pay to them, or upon their order and direction. It has been found and is admitted on both sides that on the 7th of April, 1884, the plaintiffs had upon deposit to their credit with the defendant the sum of \$14,499.08. That from this date to the close of business on the 3d day of October, 1888, the defendant had and received to and for the use of the plaintiffs various other sums of money, deposited from time to time, between these dates, by the plaintiffs with the defendant, amounting in the aggregate to \$6,213,586.71. That between the 7th day of April, 1884, and the close of business on the 3d day of October, 1888, the defendant paid to the order of plaintiffs, on their checks drawn against the balance above stated

and the deposits subsequently made, various sums of money, amounting in the aggregate to \$6,030,040.29. This would leave a balance due to the plaintiffs by the defendant of \$198,045.50, which, with interest, is the sum that constitutes the subject of this controversy. The defendant alleged in its answer that all moneys deposited with it by the plaintiffs were fully paid upon their order, and by checks drawn upon it by them; and, in order to meet and disprove the plaintiffs' claim that there was due to them from the defendant, at the close of business on the 3d day of October, 1888, the sum of \$198,045.50, the defendant produced twenty-seven checks, all signed by the plaintiffs and drawn upon the defendant, directing the payment of sums respectively aggregating the total balance above mentioned, and to recover which the plaintiffs brought the action. That the defendant actually paid these checks is not disputed, and the case is thus made to turn upon the question whether they are available to the defendant as lawful vouchers, establishing the fact that the moneys claimed by the plaintiffs were paid out by the defendant upon these checks according to the order and direction of the plaintiffs.

A clear understanding of the question involved requires a brief statement of the facts and circumstances under which these twenty-seven checks were signed by the plaintiff and presented to and paid by the defendant. The plaintiffs are a well-known law firm in the city of New York, engaged in an extensive business, which, in its organization, had a department known as the "Real Estate Department." In this branch of their business they examined titles for clients who were lenders of money on bond and mortgage, carried out and completed such loans, and occasionally examined titles for clients who were purchasers of real estate. One of the members of the firm had general charge of this department, but the details of the business and the execution of the work were intrusted to subordinates. One James E. Bedell, a lawyer who had been admitted to the bar in the year 1868, and had been in the employ of the plaintiffs since 1873, assisting in the real estate department, was, in the year 1881, practically put in charge of the work of this department, under the direction of the member of plaintiffs' firm who had the general charge. Bedell was an experienced and capable lawyer. The plaintiffs believed that he was honest and trustworthy, and, prior

to the discovery of the very extraordinary crime in connection with these checks, they had no reason whatever to suspect or distrust him. During the period covered by the transactions in question the plaintiffs employed one Dodge, a competent expert book-keeper, who took charge of the plaintiffs' books, and acted as cashier. He kept the account between the plaintiffs and defendant. He filled out all the checks and made all the entries in the check-books, and the checks, when paid by defendant, came to him with the pass-book, which was balanced by the defendant, and the vouchers, including the checks in question, returned with the book, from time to time, at frequent intervals. The course of the business in which the checks in question were issued was substantially as follows: The plaintiffs' client, who wished to make a loan through them, furnished the money, which went directly into the plaintiffs' general bank account with the defendant. Against the sum to be loaned, and thus put to the plaintiffs' credit, checks were filled up by Dodge, the cashier, from a written statement made by Bedell, showing the amount required to pay liens or charges on the property to be mortgaged, the amount of the plaintiffs' charges, and any other items entering into the transaction, and the balance to be paid the borrower. After filling up the checks, Dodge would take the check-book, with the filled-up checks, to a member of the firm for signature, showing him the entries in the check-book of the deposit of the client's money, and the statement of Bedell as to the payments to be made; and thereupon the checks would be signed by the plaintiffs, in the name of the individual partner to whom it was presented by Dodge, the firm name being engraved on each check and the individual signature underwritten. Dodge would then take away the check-book, and deliver the several checks to Bedell. In this manner the twenty-seven checks in question were intrusted by the plaintiffs to Bedell, their clerk, for delivery to the payees, respectively, therein named, who were in good faith believed by the plaintiffs to be real persons entitled to receive the amount of said checks, respectively, from them or their clients. The defendant paid the checks to a third person, upon an indorsement thereon of the payees named, forged by Bedell, who converted the proceeds to his own use. The names of the payees written in sixteen of the twenty-seven checks, drawn for sums

aggregating \$112,818.72, were not the names of real, but fictitious, persons. The remaining eleven checks, drawn for sums aggregating \$55,227.03, were made payable to the order of real persons, whose indorsements were in every case forged by Bedell.

Only three of the checks, drawn for less than \$2,400, were paid to Bedell by defendant. All the others were deposited, from time to time, in various other banks in the city of New York, and the money thereon received by Bedell from these banks, and the checks all ultimately paid by defendant through the exchanges in the clearing-house, in the due and regular course of business. As to the sixteen checks payable to the order of fictitious persons, the plaintiffs were led by fraudulent contrivances and representations on the part of Bedell, the details of which appear in the record, to believe, and they did in fact believe, until the discovery of the forgeries, that such payees were real persons; and as to all the checks the plaintiffs did not intend that any of them should go into circulation, or should be paid by the defendant, otherwise than through a delivery to and indorsement by the payee named therein. The checks were paid in every case by the defendant without any inquiry as to the genuineness of the indorsements, and in reliance upon the responsibility of the parties presenting the same, and not in reliance upon any thing done or forborne by the plaintiffs, except that they were signed by them. There is no claim that, at the time the defendant paid the checks, it had any knowledge or suspicion or reason to suspect that any of the indorsements were forged, or that any of the names were fictitious, or that there was any fraud or irregularity in respect to any of the checks, or any indorsement or writing thereon. The plaintiffs' confidence in Bedell, and his representation of them in all their dealings with clients, concerning loans on real estate, continued without interruption until one of these clients, upon examining a fabricated mortgage sent to him by Bedell, had his attention arrested by the faintness of the impression of the seal of the register on the certificate of record, so that he sent the mortgage to the register's office for a better sealing. This led to the discovery of all the frauds, forgeries, fabrications of documents, attestations and official certificates carried on by him in the plaintiffs' office for more than four years. The plaintiffs did not discover that the indorsements on the checks had been forged, or that the amount

thereof had not been paid to them or their order, until nearly four months after May 22, 1888, which was the date of the last check so forged. On the discovery of the facts, and before the commencement of this action, the plaintiffs tendered the checks to the defendant, and demanded that the amount of the same should be paid to them or credited in their account by the defendant, which tender and demand were refused.

The various deposits of money, made from time to time by the plaintiffs with the defendant, created the relation of debtor and creditor, and the law implies a contract on the part of the defendant to disburse the money standing to the plaintiffs' credit only upon their order and in conformity with their directions. The defendant is not entitled to charge against the plaintiffs' account any sums as payments, unless they have been made to such persons as the plaintiffs directed. Such payments as were made without the order of the plaintiffs of their funds by the defendant afford to it no protection, when called upon by the plaintiffs to account for the money deposited. Payments made upon forged indorsements are at the peril of the bank, unless it can claim protection upon some principle of estoppel or some negligence chargeable to the depositor. These rules are so familiar and so well established and illustrated by the adjudged cases that a bare reference to them is all that is needful here. *Crawford v. Bank*, 100 N. Y. 53; 2 N. E. Rep'r, 881; *Ætna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 86; *Corn Exchange Bank v. Nassau Bank*, 91 N. Y. 80; *Phoenix Bank v. Risley*, 111 U. S. 125; 4 Sup. Ct. Rep'r, 322; *Bank of British North America v. Merchants' Nat. Bank*, 91 N. Y. 106; *Marine Bank v. Fulton Bank*, 2 Wall. 256; *Bank v. Whitman*, 94 U. S. 347; *Citizens' Nat. Bank v. Importers & Traders' Bank*, 119 N. Y. 195; 23 N. E. Rep'r, 540.

The statement of the account made by the defendant to the plaintiffs, from time to time, the balancing of the bank pass-book, and the return of the same to the plaintiffs with the vouchers, including, as they did, the checks in controversy, with the forged indorsements thereon, constitute no obstacle to the maintenance of this action by the plaintiffs, as they were ignorant of the facts and circumstances under which the checks were issued and put in circulation. An account thus stated can always be opened upon proof of mistake or fraud; and the only effect of the plaintiffs'

silence as to the correctness of the account rendered by the defendant is to put upon them, in this action, the burden of showing that the account, as stated, was the result of fraud or mistake—a burden which they have fully assumed and met, as the referee has found.

It is urged that the plaintiffs owed the duty to the defendant of examining the vouchers returned to them with the balanced pass-book, from time to time, and that a careful examination of the same would have disclosed the fact that the money was received upon the checks by Bedell, and his forgeries thus detected. The duty of examining the returned vouchers was delegated by the plaintiffs to their cashier and book-keeper who was a faithful and competent person for many years in plaintiffs' employ. The referee found as a fact, from all the circumstances of the case, that the failure to discover the forgeries sooner than they were was not, in any case, caused by any neglect on the part of the plaintiffs, or their cashier, of any duty that the plaintiffs owed to the defendant. The examination of the checks would of course, enable the plaintiffs to ascertain whether their own signature was genuine, and whether the amount, date or name of the payee had been changed, but would not necessarily enable them to detect the forgery of the payee's name. The law imposed no duty upon the plaintiffs to do more than they did to ascertain whether the indorsements on the checks were genuine. The defendant's contract was to pay the checks only upon a genuine indorsement. The drawer is not presumed to know, and in fact seldom does know, the signature of the payee. The bank must, at its own peril, determine that question. It has the opportunity, by requiring identification when the check is presented, or a responsible guaranty from the party presenting it, of ascertaining whether the indorsement is genuine or not. When it returns the check to the depositor as evidence of a payment made by his direction, the latter has the right to assume that the bank has ascertained the fact to be that the indorsement is genuine. *Weisser v. Denison*, 10 N. Y. 68; *Welsh v. Bank*, 73 N. Y. 424; *Frank v. Bank*, 84 N. Y. 209; *Bank v. Whitman*, 94 U. S. 347; *Bank v. Morgan*, 117 U. S. 107; 6 Sup. Ct. Rep'r, 657.

The plaintiffs committed the examination of the vouchers when returned from the bank to a faithful and competent cashier, who

failed to discover the forged indorsements. There is not the slightest reason to believe that if the checks had been examined by one of the plaintiffs themselves, the result would have been any different. We are unable to see that any thing was done or omitted by the plaintiffs with respect to the examination of the indorsements upon the vouchers, that excuses the defendant from its obligation to pay only upon a genuine order. Nor can we perceive any thing done or omitted by the plaintiffs in the general conduct and management of their business, or in the employment of and confidence reposed in Bedell, that estops them from alleging that the twenty-seven checks were paid without their authority. Whether the plaintiffs were guilty of any negligence in that regard was a question of fact, and the finding is, that they were, in so far as the defendant was concerned, reasonably prudent and careful, and that the payment of the checks was not caused by any negligence on their part, and we do not think it can be said that this finding is without evidence. Moreover, it is found that the defendant paid the twenty-seven checks, in each case, without any inquiry as to the genuineness of the indorsements, and in reliance upon the responsibility of the persons presenting the same for payment, and not in reliance upon any thing done or forbore by the plaintiffs, except the fact that the checks had been drawn by them; and further, that all the checks, except the three paid directly to Bedell, and amounting to less than \$2,400, were presented to the defendant by and paid to banks perfectly solvent, and liable to respond to the defendant for all moneys paid upon the forged indorsements. These findings, supported as they are by the evidence, dispose of much of the argument of which it is sought to establish the proposition that the plaintiffs are, by reason of their own acts and omissions, estopped from claiming that the checks were paid by the defendant without their authority. The facts upon which an estoppel must always be based are found against the defendant.

Bedell, in issuing the forged checks and fabricating the false papers to conceal his crimes, did not act as the plaintiffs' agent, and his acts in this regard are not binding upon them, nor are they in any manner affected by this knowledge of the facts. The questions that arise in this case, and are so ably and elaborately discussed in the briefs of counsel, with respect to the examination

of the returned checks and pass-book, the manner in which the plaintiffs' business was conducted, and the degree of care and supervision that was exercised over their subordinates, how far the plaintiffs are bound by the criminal acts and knowledge of their clerk, as well as the general rule of estoppel, when applied to this class of cases, are not new. They have been frequently and fully discussed in the numerous cases in this court, involving the rights and duties of banks and depositors, and it would extend this opinion beyond reasonable limits, and serve no useful purpose, to go over the ground again. *Frank v. Bank*, supra; *Welsh v. Bank*, supra; *Weisser v. Denison*, supra; *People v. Bank*, 75 N. Y. 547; *Bank v. Morgan*, supra; *Mayor, etc., v. Bank of England*, 21 Q. B. Div. 160. It is enough to state our general conclusion that, with respect to all these points, the defendant has failed to establish any defense to the action.

It is claimed by the defendant that the sixteen checks made payable to the order of persons having no existence were, in legal effect, payable to bearer. It is provided by statute that paper made payable to the order of a fictitious person, and negotiated by the maker, has the same validity, "as against the maker and all persons having knowledge of the facts, as if payable to bearer." 1 Rev. Stat., p. 768, § 5. We are of the opinion, upon examination of the authorities cited by counsel on both sides, that this rule applies only to paper put into circulation by the maker with knowledge that the name of the payee does not represent a real person. The maker's intention is the controlling consideration which determines the character of such paper. It cannot be treated as payable to bearer, unless the maker knows the payee to be fictitious and actually intends to make the paper payable to a fictitious person. *Bank v. Alley*, 79 N. Y. 536; *Turnbull v. Bowyer*, 40 N. Y. 456; *Vagliano v. Bank of England*, 22 Q. B. Div. 103; on appeal, 23 Q. B. Div. 243; *Armstrong v. Bank*, 22 N. E. Rep'r, 866 (Sup. Ct. Ohio, Oct., 1889); *Gibson v. Minet*, 1 H. Bl. 569.

The findings of the referee that the plaintiffs in good faith believed that the names of the payees represented real persons, entitled to receive from them the amount of the check in each case, having been led to believe this by the fraudulent contrivances of Bedell, and that they intended that Bedell should deliver the

check to a real payee therein named, and that they did not intend that they should go into circulation or be paid by defendant otherwise than through a delivery to and indorsement by the payee named, and that plaintiffs gave no authority to Bedell to indorse the name of the payee, or to put the checks into circulation, and that no one in fact relied on any appearance of authority, derived from the plaintiffs, in Bedell to indorse the payee's name upon the checks, or to put them in circulation, disposes of this question. The indorsement of the names of the fictitious payees upon the checks, with intent to deceive and to put the checks in circulation, constituted the crime of forgery, by means of which, and without any fault of the plaintiffs, payment was obtained thereon. The defendant does not occupy any different position with reference to the checks payable to fictitious payees than it does with reference to those payable to real parties whose indorsements were forged. Bedell of course knew that the payees were fictitious, but he was not acting within the scope of his employment, but in carrying out a scheme of fraud upon the plaintiffs, and under such circumstances his knowledge cannot be imputed to his principals. *Frank v. Bank*, supra; *Weisser v. Denison*, supra; *Welsh v. Bank*, supra; *Cave v. Cave*, 15 Oh. Div. 643, 644.

The case presents another and peculiar question. It seems that ten of the eleven checks, which were made payable to the order of real persons, were made good by Bedell to the several payees, and the defendant has set up these facts in its answer as a partial equitable defense. The referee made no finding on the subject, but Bedell so testified, and was not contradicted, and the question arises upon a request by the defendant to find, in substance, that, the amount of these ten checks having been made good by Bedell to the several payees, the plaintiffs, having sustained no loss by reason of the payment thereof, are not entitled to recover in this action, against the defendant, any sum on account of or by reason of the payment by defendant of the same. The request was refused, and the defendant excepted. Keeping in view the theory of this action, and regarding the evidence before the referee, we cannot perceive that there was any error in refusing the request. Bedell testified, in substance, that at the time of the commencement of the action the plaintiffs were liable to clients to the ex-

tent of \$264,000 on account of his frauds. There were \$200,000 in fabricated mortgages which had been delivered by Bedell to clients on account of an equal sum of money paid by the clients to plaintiffs for investment, and which Bedell had converted to his own use. The \$64,000 was obtained through other frauds upon clients which the plaintiffs were liable to be called upon to make good. One of the plaintiffs testified that his firm had actually paid to clients on account of Bedell's frauds over \$242,000. It was not shown by what funds or in what manner Bedell made good to the payees the amount of the checks intended for them. None of the money paid by him was traced to the defendant. The plaintiffs' action was not upon the checks, nor for damages by reason of their payment, but on defendant's implied promise to pay the money deposited to the plaintiffs or upon their order.

The plaintiffs' case was made out without the checks at all, except so far as they were necessary as proof to open the account stated. In substance, the referee was asked to hold that by reason of the payment by Bedell of the amount of the checks to the persons named therein, without any reference to the source from which the money came, they were to be charged to the plaintiffs the same as if paid by their authority. The proof given did not justify this conclusion. As it was not shown that such payment was made at the expense or to the injury of the defendant, or that the plaintiffs profited by it, the cause of action stated in the complaint was not affected by the fact. It is no doubt true that indemnity to the payees of checks diverted as these were, made by the wrong-doer, might, under certain circumstances, constitute a basis for equitable relief in an action of this kind, but the proof did not go far enough to warrant it in this case.

The very recent case of *Vagliano v. Bank of England* occupied such a prominent place in the discussions of the questions involved in this appeal by the courts below, and it is now so earnestly pressed upon our attention by the learned counsel for the defendant as a controlling authority in support of his views, that we consider it necessary to refer to it, and point out, so far as we can, the rule or principle which it decides. In the magnitude of the sum involved, the boldness and ingenuity with which a clerk perpetrated a stupendous fraud upon his employer, and in many other respects, that case, doubtless, bears a very strong resemblance to

this. The question there was whether the defendant was entitled to debit the plaintiff, one of its depositors, with forty-three forged bills of exchange, amounting in the aggregate to £71,500, which it had paid, upon genuine acceptance by the plaintiff, but procured by fraud under substantially the following circumstances: Vagliano, the plaintiff, was a merchant and foreign banker in London, with correspondents in various parts of the world, and transacting an enormous business with the defendant, his general banker. He employed in his office a considerable number of clerks, and among them one Glyka, who had charge of the foreign correspondence. One Vucina, a merchant and banker at Odessa, was, and for thirty years had been, one of Vagliano's correspondents, transacting with him a large business, and having practically unlimited credit. For many years he had drawn drafts for large amounts, when necessary, upon the plaintiff, payable sometimes to his own order, but more frequently to the order of a payee named therein. The course of business in the office was well known to Glyka, who procured specimens of Vucina's letters of advice, which always preceded the drafts, and specimens of the drafts themselves. Having done so, he had paper prepared identical in general appearance and texture with that upon which Vucina's genuine letters and bills were written. This enabled him to forge letters of advice and drafts with Vucina's name as drawer, which he executed with extraordinary skill, and in each case he wrote upon the face of the bill, as payees, the name of C. Petrida & Co., a firm who carried on business at Constantinople, and had business relations with Vucina, but had no connection whatever with the fabricated drafts. Glyka caused these forged letters of advice and drafts to be laid before Vagliano, his principal, who, being deceived by the skillful manner in which the papers were prepared, and the confidence he reposed in his clerks, wrote a genuine acceptance on the face of each bill, as it was put before him from time to time, during a period of some four months, payable in every case at the Bank of England.

These fabricated bills, having been thus accepted, were placed with the other and genuine bills in a box in the office, to be delivered according to the usual course of business to the proper party, when called for. Glyka stole the bills from the box, forged the indorsement of the payees thereon, presented them at

the counter of the bank, and received the money thereon. By the English bills of exchange act of 1882 (45 & 46 Vict., chap. 61, § 7, subd. 3) it was enacted, with reference to bills of exchange, that, "where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer." The bank defended upon two grounds: (1) that they were protected by this statute; and, (2) that the plaintiff was guilty of such negligence as precluded him from claiming that the payments, made upon these bills, were without authority. On the trial of the action, before Mr. Justice Charles, the plaintiff recovered. 22 Q. B. Div. 103. On appeal the judgment was affirmed, the master of the rolls alone dissenting, on the ground that the bank was protected by the bills of exchange act. 23 Q. B. Div. 243. Thus far the views of the court, on both hearings, were in harmony with the contention of the plaintiffs in the case at bar, both as to the construction of the statute and the facts bearing on the question of negligence. The judgment, however, has recently been reversed by the house of lords, and we have been furnished with copies of the opinions given upon the final decision of the appeal, and have given to them the careful consideration which the high authority of the tribunal from which they emanate and the importance of the case seem to demand. The main point upon which the case turned in the review by the house of lords, as we understand the opinions, was the construction to be given to the bills of exchange act. It was held, contrary to the opinions below, that, whenever the name inserted as payee is without any intention that payment shall only be made in conformity therewith, the payee then becomes a fictitious person, within the meaning of the act, and, therefore, the forty-three bills were within the statute, though Petrida & Co. were in fact existing and real persons. When this conclusion was reached, the plaintiff's case necessarily failed, as it was but another way of stating that the bank paid the fabricated bills according to their legal tenor and effect, and according to the plaintiff's directions, that is, to bearer.

It is hardly necessary to add that, if we could follow that case in giving construction to our statute, the same result would follow in this case. But it is quite obvious that we cannot. The language is different. Our statute is a codification of the common law, while the English statute is, and was intended to be, a de-

parture from it. In so far as the opinions deal with the facts of the case, upon the question of negligence, it is difficult to deduce from them any abstract rule or principle. Moreover, there is, as it seems to us, a material difference, in some respects, between the facts of that case and the one at bar. Vagliano, through the contrivances of his clerk, had put before him a fabricated bill, the spurious character of which he failed to detect, and he affixed to it a genuine acceptance, thereby accrediting it to the bank as a genuine instrument. He left the bill, thus accepted, in a place where the dishonest clerk could easily purloin it. The manner in which the business was conducted was such as to enable the clerk to possess himself of the means whereby the fraud was successfully carried out without check or detection. The view of the case taken in the opinions delivered in the house of lords, aside from the question of the construction of the statute, may very well be attributed to a different shading in the facts, and to the further consideration which can be inferred from the record, that that tribunal is not confined, as we are, to a review of the courts below upon questions of law only. For these reasons the Vagliano Case cannot be regarded as authority adverse to the conclusion at which we have arrived in this. We have examined the other exceptions appearing in the record, to which our attention has been directed, and we are of the opinion that none of them can be sustained. The judgment should be affirmed. All concur; Gray, J., in result.*

1. **Bank and banking — forged checks.**— Defendant cashed a forged check, purporting to be drawn on plaintiff by one of its customers, without attempting to identify the person presenting it; and afterward the check was allowed defendant as a credit on a settlement between the two banks. The nominal drawer was not a customer of defendant, and the check, which was payable to the payee or bearer, was indorsed by the payee. The check remained with plaintiff over a month before it was discovered to be a forgery, but defendant was notified immediately after the discovery, and the delay worked no prejudice to the defendant. Held, that the defendant was liable for the loss. *First Nat. Bank v. First Nat. Bank*, 151 Mass. 280; 24 N. E. Rep'r, 44.

2. **Payment upon forged indorsement — liability of drawee to real payee.**— After a bank-draft which had been paid to one who held it under a forged indorsement was returned to the drawee, the latter redelivered it to the payee, who demanded payment, which was refused, whereupon the drawer paid the draft after protest. Held, that the drawer had a right of action against the drawee for its refusal of payment. *Citizens' Nat. Bank v. Importers & Traders'*

* Reported in 27 N. E. Rep'r, 571; 126 N. Y. 818.

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Nat. Bank, 119 N. Y. 195; 23 N. E. Rep'r, 540. In such an action, where the only plea is payment, evidence that the plaintiff has made a settlement with the forger of the indorsement is inadmissible in defense. *Ibid*.

3. *Receiving forged check upon deposit—Liability for loss as between bank and depositor.*—A depositor brought to his bank a check which the cashier, simply from its amount, and not from any appearance of fraud, advised him not to take, as it might be raised, but said it could be deposited for collection, and, if it was not returned, they would suppose it all right. It was left and credited to the depositor, who, two days later, without making further inquiry, completed the sale in which it was offered in payment. The bank's correspondent credited it with the check, but about a month later it was returned by the bank on which it was drawn as being raised, and the correspondent charged it up to the depositor's bank, which charged it to the depositor. Held, that the depositor could not recover the amount of the bank, on the ground of negligence or because of the credit to his account. *Rapp v. National Security Bank*, 187 Penn. St. 436; 20 Atl. Rep'r, 506.

4. *Payment of forged check by bank—Liability to depositor.*—Where a bank pays money of a depositor to one who has forged his name, the bank knowing that such depositor cannot write, it is liable to him for the money so paid, though it relied on the forger's statement that he had authority to sign the depositor's name. *Georgia R. & Banking Co. v. Love & Good-will Society*, 85 Ga. 298; 11 S. E. Rep'r, 616.

UNION DEPOT R. CO. v. SOUTHERN RY. CO. ET AL.

(Supreme Court of Missouri, June 29, 1891.)

1. *STREET RAILWAY. ACCEPTING ORDINANCE WITHOUT CONDITIONS. EFFECT.* A street railway company, by accepting the provisions of a city charter enacted after its organization, and all ordinances then or thereafter passed relative thereto, stands in the same position that it would had such charter and ordinance gone into effect before it was incorporated.

2. *RIGHT TO USE TRACKS OF ANOTHER STREET RAILWAY COMPANY. COMPENSATION.* Article 10, section 6, of the charter of St. Louis provides that "any street railroad company shall have the right to run its cars over the track of any other street railroad company on payment of just compensation for the use thereof, under such rules and regulations as may be prescribed by ordinance; and it shall be the duty of the municipal assembly to immediately pass such ordinances as may be necessary to carry this provision into effect." Held, that an ordinance having been passed giving the right to use tracks, the only thing necessary to perfect the right was to have the "just compensation" ascertained, as provided by ordinance.

3. *WHETHER POWER OF EMINENT DOMAIN INVOLVED IN SUCH CASE.* Proceedings under an ordinance providing that when the right to use the tracks of one company has been granted to another company, and the two cannot

agree as to compensation, it shall be determined by commissioners appointed by the mayor, do not involve the exercise of the right of eminent domain.

4. CHARTER OF ST. LOUIS CONSTRUED AS TO GRANTING ANY TRACKS OF ONE COMPANY BY ANOTHER. Under said article 10, section 6, of the charter of St. Louis, the city has the power to make rules and regulations, not only for running the cars of one company over the tracks of another, but also for ascertaining the compensation to be paid therefor.

5. POWER OF COUNCIL TO MAKE AWARD REVIEWABLE BY CIRCUIT COURT. Under said section, the assembly has also the implied power to make the award reviewable by the circuit court.

IN *banc*. Appeal from St. Louis circuit court, James A. Seddon, judge.

Luebke & Muench and *L. Bell* for appellants. *Hitchcock, Madill & Finkelnburg* and *Smith P. Galt* for respondent.

BLACK, J. The plaintiff and the first-named defendant are corporations owning street railroads in the city of St. Louis. Prior to the date next mentioned, the defendant's road extended southward six or eight miles from the crossing of Sixth and Market streets. The city, by ordinance approved 19th July, 1887, gave defendant the right to extend its road from the crossing of Sixth and Market streets east on Market street to Fifth street, thence north on that street some ten blocks, thence west one block, thence south on Sixth street to place of beginning, thus forming a loop. This ordinance also conferred upon the defendant the right to use that part of the plaintiff's track extending for a distance of two blocks on and along Sixth street, upon paying the plaintiff compensation for such use, under the provisions of ordinance 12,652 enacted to carry into effect section 6 of article 10 of the city charter. The plaintiff and the defendant corporation having failed to agree as to the compensation to be paid for the use of that part of the defendant's road extending along the two blocks, the plaintiff applied to the mayor for the appointment of commissioners to assess such compensation. The mayor was about to comply with such request, when the plaintiff commenced this suit against the defendant company and the mayor, seeking to restrain them from taking any further action in the matter. The circuit court awarded a temporary injunction, which was made perpetual on the final hearing, and from that decree the defendant appealed to this court. The substantial facts, not before

stated, are these: The present charter of the city of St. Louis took effect on the 22d October, 1876. It was framed, and adopted by the voters, pursuant to the constitution of 1875. It took the place of and superseded the then charter, and all amendments thereof. Const. 1875, art. 9, § 20. The tenth article of the charter treats of street railroads, and gives the municipal assembly power to determine all questions arising with reference to them, whether such questions may involve the construction, granting the right of way or regulating and controlling them after their completion; also the power to regulate the time and manner of running cars, and the rates of fare, and to establish a uniform gauge. The sixth section is in these words: "Any street-railroad company shall have the right to run its cars over the track of any other street-railroad company, in whole or in part, upon the payment of just compensation for the use thereof, under such rules and regulations as may be prescribed by ordinance, and it shall be the duty of the municipal assembly to immediately pass such ordinances as may be necessary to carry this provision into effect." Ordinance No. 12,652, approved January 12, 1884, was designed to carry into effect said section 6 of the charter. This ordinance provides, in substance, that when one company is authorized by ordinance to run its cars over the track of another company and the two companies cannot agree as to the compensation to be paid therefor, the company desiring to use such track may make written application to the mayor for the appointment of three commissioners, first giving ten days' notice to the company whose track is to be used. Each company has the right to name one commissioner, and the mayor the third. If either company should refuse to designate a commissioner, the mayor may appoint one to represent such company. The commissioners must be disinterested freeholders, must take and subscribe an oath that they will faithfully and fairly hear and examine the matter in controversy, and make a just award to the best of their understanding, and then proceed to hear evidence, and examine the track, and determine the compensation to be paid, and the time and manner of paying the same. Their award is to be in writing, and must be reported to the mayor. It is then the duty of the mayor to file the report and the original application and all papers pertaining to the proceeding, with the city register and it is made the duty of the register to notify the

parties in interest. Either party may appeal to the circuit court by filing written exceptions, "and the court may thereupon make such order therein as right and justice may require and may order a new appraisement in the manner hereinbefore prescribed, upon good cause shown." The plaintiff was incorporated on the 11th May, 1876, and acquired all the franchises and property of a then existing street-railroad company, which was incorporated in 1859. The plaintiff, it will be seen, was incorporated a few months prior to the adoption of the present city charter; but thereafter it extended its road, from time to time, by right acquired under ordinances passed after the present charter took effect. One of these ordinances, which was approved November 3, 1883, contains this clause: "Said Union Depot Railroad Company shall not acquire any privileges, rights or franchises under this ordinance unless said company files with the city register, within sixty days from approval of this ordinance, its acceptance in writing of all the provisions of this ordinance and also of all the provisions of sections 5 and 6 of article 10 of the city charter and all ordinances now existing or hereafter to be passed relating thereto." This ordinance was duly accepted by the plaintiff.

1. Although the plaintiff, the Union Depot Railroad Company, was incorporated prior to the date when the present city charter took effect, still by accepting the ordinance last mentioned, approved 3d November, 1883, it agreed to and did become subject to sections 5 and 6 of article 10 of the charter, and to all ordinances then or thereafter passed pursuant to those sections. As to those sections of the charter and all valid ordinances enacted to put them in force, the plaintiff stands in the same position that it would had it been incorporated and acquired the right to operate its road on the streets, after the charter went into effect. We believe there is no serious dispute as to these propositions; but the plaintiff does question the validity of general ordinance No. 12,652.

2. The plaintiff, in terms, disclaims the right to use the streets now occupied by it to the exclusion of all other street railroads; but it insists — First, that the defendant can acquire the right to run its cars over the plaintiff's track only by the exercise of the right of eminent domain; second, that the municipal assembly of St. Louis has no power to enact laws for the exercise of that right

by one street railroad over the property of another like company ; third, if the charter attempts to confer such power upon the assembly, then such charter provisions are unconstitutional and void ; fourth, if the charter is valid and even confers such power, then ordinance No. 12,652 is invalid, because it does not give the plaintiff a trial by jury, and for various other assigned reasons. These objections interposed by the plaintiff are all based upon the assumption that the defendant can only acquire the right to run its cars over the plaintiff's track by a process of condemnation. We must, therefore, at the outset, determine the question whether the defendant has acquired the right to use the plaintiff's track, or whether it must acquire that right by condemnation. By the right of eminent domain, private property is taken for the purpose of promoting the general welfare without the owner's consent. His consent is not necessary ; and the damages arising for the property taken do not arise out of contract. But the state, in delegating this power to a corporation to take private property for public use, may attach conditions that the property taken shall be subject to the use of other corporations doing a like business. Thus it has been held that the legislature, having reserved the power to amend, alter and repeal the charter of a street-railroad company, may authorize another company to use the track of the first corporation, making compensation to that company for the use and wear of its tracks, without making any compensation for the diminution of its profits or of the value of its franchise. *Metropolitan R. Co. v. Highland St. Ry. Co.*, 118 Mass. 290. See, also, *Metropolitan R. Co. v. Quincy R. Co.*, 12 Allen, 262. The power conferred upon a city to give or withhold its consent to the construction of a railroad within its limits is not limited to saying "Yes" or "No." In giving such consent, the city may attach conditions. *Pacific R. Co. v. Leavenworth City*, 1 Dill. 393. In *Joy v. St. Louis*, 138 U. S. 1 ; 11 Sup. Ct. Rep'r, 243, the board of Forest park commissioners and two railroad companies made an agreement concerning a right of way through the park, in which it was provided that the railroad companies should permit other railroad companies to use the right of way through the park upon such fair and equitable compensation to be paid therefor as might be agreed upon by such companies. Subsequently a third company claimed the benefit of this agreement, and to en-

force that claim brought a suit to compel specific performance of the contract. Speaking of this agreement, the court said it "created an easement in the property" of the two companies "for the benefit of the public, which might be availed of, with the consent of the public authorities, properly expressed, by the railroad companies which might wish to use not only the right of way through the park, but also that between the park and the Union Depot." The court also held that, if the parties did not agree upon the compensation to be paid, a court of equity could fix the amount, because the agreement was that the amount should be "fair and equitable." *Kinsman St. R. Co. v. Broadway & N. St. R. Co.*, 36 Ohio St. 239, was a suit by the plaintiff corporation against the defendant corporation, the city of Cleveland, and others, to enjoin the defendant corporation from running its street-cars upon the tracks of the plaintiff.

The plaintiff had been granted the right to lay its tracks upon certain streets "under the terms and conditions" of a general ordinance, "or which may hereafter be prescribed by the city council." Thereafter the council gave the defendant corporation the right to run its cars over the plaintiff's tracks on terms of compensation that might be agreed upon by the parties, and, in case of failure of the parties to make any agreement, "such terms of compensation shall be prescribed by the city council." The parties failed to agree, and the council fixed the compensation, which the plaintiff refused to accept, tender having been duly made. The right of the council to prescribe "terms and conditions" in the future, reserved by the grant to the plaintiff, was held to be sufficient to justify the council in giving the defendant the right to run its cars over the plaintiff's tracks. The court, therefore, dismissed the petition. A text-writer, citing this Ohio case and *Jersey City & B. R. Co. v. Jersey City & H. H. R. Co.*, 20 N. J. Eq. 61, says: "Where the right to lay tracks in streets is granted upon condition that the right to use them by another company may be granted upon compensation to be fixed by the council in case the companies cannot agree, the condition is binding." *Lewis Em. Dom.*, § 490. By the constitution of this state, the legislature can pass no law granting the right to construct and operate a street railroad within any city without the consent of such city. Art. 12, § 20. Following this provision,

and in accordance with it, the charter of St. Louis provides that any such railroad company shall have the right to run its cars over the track of any other company by paying just compensation therefor. The plaintiff accepted this charter provision, and all ordinances then or thereafter passed to put it into force and effect. The plaintiff owns its road and franchises, it is true; but the city has the reserved power, in the interest of the public welfare, to permit any other company to run its cars over the plaintiff's road, for such is the contract between the plaintiff and the city. The city has exercised this reserved power, and has granted to the defendant the right to use the plaintiff's track. There is, therefore, no necessity for resorting to any process of condemnation to acquire that right, for it is fixed by law and the contract of the parties. There remains nothing more to be done but to ascertain the "just compensation" to be paid to the plaintiff, and that must be ascertained by and under the ordinance. The proceeding pointed out by the ordinance for ascertaining the compensation does not involve the exercise of the right of eminent domain. It is simply a proceeding to enforce contract rights, and has none of the elements of a suit to condemn property for public use. These conclusions, we think, are sustained by the authorities before cited.

3. Thus far we have assumed that section 6 of article 10 of the charter gives the city power to make rules and regulations for ascertaining the compensation to be paid the plaintiff; but it is earnestly insisted that said section gives the city no such power, and that by the terms thereof the city can only prescribe "rules and regulations" for running the cars of one company over the track of another company. There is plausibility in this reading of the section, but we think such construction is too limited. Other sections of the same article give the assembly full power to regulate the time and manner of running cars in all cases; and it would seem the framers of the charter, in the use of the words, "under such rules and regulations as may be prescribed by ordinance," intended to confer upon the assembly additional powers. To give the words quoted any additional force and effect, they must be made to qualify the compensation clause. We do not overlook the fact that the plaintiff accepted sections 5 and 6 only, but we may look to the whole article to ascertain the meaning of

any particular section therein. The article, as a whole, shows an intention to place the whole matter of regulating street railroads in the hands of the assembly, and we should give the various sections a construction which will carry into effect that intention. Punctuation marks are often guides to the true meaning of a statute, but such marks must yield to an intention disclosed by the statute taken as a whole. Omitting the words, "in whole or in part," which may be done without changing the meaning, and dropping some of the commas, the section reads: "Any street-railroad company shall have the right to run its cars over the track of any other street railroad company upon the payment of just compensation therefor under such rules and regulations as may be prescribed by ordinance, and it shall be the duty of the municipal assembly to immediately pass such ordinances as may be necessary to carry this provision into effect." It is the duty of the assembly to pass ordinances to carry what provision into effect? Plainly, all that precedes the last clause of the section. With this construction it follows that the assembly may provide a method for fixing the compensation to be paid to the company whose track is used by another company.

4. It is not necessary to discuss in detail the various questions made in the briefs, which are based upon the assumption that ordinance 12,652 is one providing for the exercise of the right of eminent domain; for that is not, we have concluded, its true character. There is, however, one objection to the ordinance which may be considered on the theory that the ordinance attempts to do no more than carry out the agreement of the parties. That objection is this: that the city had no power to confer appellate jurisdiction over the award of the commissioners upon the circuit court. Section 22 of article 6 of the constitution, cited in support of the proposition, provides that the circuit court shall have "such concurrent jurisdiction with and appellate jurisdiction from inferior tribunals and justices of the peace as is or may be provided by law." This section is not in the way of any law giving the circuit court jurisdiction over the award. The legislature may authorize a city to institute and prosecute suits in the circuit and other courts. It may even delegate to a city the power to establish municipal corporation courts. *State v. Johnson*, 17 Ark. 407. Indeed, the charter of the city of St. Louis not

only provides for two police justices, but the assembly is authorized to increase the number. The mere fact that the ordinance gives the circuit court power to review the award is no objection to it. Authorized ordinances, duly enacted, have the force and effect of laws; and the question is simply this: whether section 6 confers power upon the assembly to make the award reviewable by the circuit court. In *City of St. Louis v. Telephone Co.*, 96 Mo. 626; 10 S. W. Rep'r, 197, we cited and approved the rule, as to municipal powers, laid down in 1 Dill. Mun. Corp. (4th ed.), § 89, namely: It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable." Now, the charter confers upon the city the right to make rules and regulations for ascertaining the just compensation to be paid by one company for the use of the track of another company, and it is then made the duty of the assembly to enact ordinances to carry this provision into effect. The ordinance enacted points out a practical and fair method of fixing the amount. It seems proper that the award should be subject to review by some court competent to determine whether it was made according to correct principles of law. The power to provide for a review by the circuit court is, in our opinion, a fairly implied incident flowing from the power expressly granted, and, therefore, within the second class of cases just mentioned. We must look to the nature, object and purpose of the expressed power, and also the subject-matter of which it treats; and in doing this we think it may be said the power expressly granted includes as an incident the power to provide for a review of the award by the circuit court. The ordinance is, therefore, a valid enactment. The judgment of the circuit court is reversed, and the cause remanded to the circuit court, with directions to that court to dismiss the petition.

Barclay, J., absent. The other judges concur.

Sherwood, C. J., dissents as to paragraph 4.*

* Reported in 16 S. W. Rep'r, 920; 105 Mo. 562.

Street railways — right to use each others' tracks. — The foregoing case is one of three arising out of the same facts, seeking the same relief and decided at the same time. See 105 Mo. 562, 567. The court sitting in *beno* affirms the decision No. 2 of the court. See 15 S. W. Rep'r, 1018. Thomas, J., delivering the opinion of Division No. 2, maintains the power of the legislature to provide for the use of the tracks of one street railroad company by another company under the general police power of the state. He gives a valuable argument and review of authorities on the question as follows:

"The line upon which this opinion has proceeded thus far is that respondent is bound by its acceptance of the provisions of the ordinance of March 27, 1883, and the amendatory ordinance of August 2, 1887. But we find authority for another position which bars respondent's right to the relief it seeks. It is this: Where a law confers on a corporation the right to construct and operate street railroads in the streets of a city, such corporation must be considered as holding them for the public use, and subject to the power of the legislature, when the public exigencies require it, to authorize another corporation to use the tracks of the former upon making compensation for such use. This does not grow out of the power of eminent domain or contract. It inheres in the power to regulate and control the public streets for the public convenience. In the absence of an exclusive grant, this right is, by implication, reserved to the public. In other words, in the grant of the right to lay tracks for a street railway in the streets of a city, for the public, the right to provide for the use of such track by other companies is reserved, upon making just compensation. And where the right is already in the public, the state, to exercise the right, does not proceed by virtue of the power of eminent domain. It is already the owner of the right, but it must pay for it before it can use it. When the state proceeds in the exercise of its power and right of eminent domain, it seeks to acquire the right to the use of private property. In both cases just compensation must be made, but the exercise of the power in the two cases is different. In *Covington Ry. Co. v. Covington & C. Ry. Co.*, 19 Amer. Law Reg. 765, this very question was decided. The legislature of Kentucky authorized plaintiff to construct and operate a street railroad, and afterward authorized defendant to construct a street railway also, and 'to connect with and use the track of any other street railway company in said city or vicinity, upon equitable terms.'

"Cofer, C. J., speaking for the court of appeals of Kentucky, says: 'It is true no person can lawfully place upon a street railway track a carriage adapted to run only on the iron rails, and use it for transporting passengers along the line, unless expressly authorized to do so. When the legislature grants to one person the right to construct a railway in a public street, and to carry passengers for hire, the grant is necessarily exclusive, so long as similar authority is not granted to another. No person would expend money to construct a railway if all others or any other might, at pleasure, put cars upon and use it to carry passengers for hire without making compensation for the use of the track. But, although such exclusive privilege be granted, why should it continue to be exclusive? The only reason that can be given is that the grantee has expended money or assumed obligations on the faith of the grant. But did it not do so with the knowledge implied, at least, that it held its right subordinate to the power and duty of the legislature to regulate and control the use of the streets in such manner as the public interest might in

its judgment, from time to time, demand? There was no attempt by express words in the appellant's charter to give it exclusive right to run cars upon the streets occupied by its track, or even upon the track itself, and we have decided that no such exclusive right exists as to the streets. As to the track placed in the street, and thereby made a part of the public highway, and which the exigencies of the public interest might demand for the use of other companies, we think the right to its exclusive use was received and held subject to the power of the legislature to permit it to be used by such other persons and corporations as it might direct, whenever, in the judgment of the legislature, a due regard to the public right to use the streets renders it necessary to do so. This conclusion is in accord with the views of Judge Redfield as expressed in his report to the Massachusetts legislature upon the nature and extent of street railway franchises (1 Redf. R. R., pp. 315, 322), and is supported by the opinion of the supreme court of New York in *Railroad Co. v. Kerr*, 45 Barb. 138, and the supreme judicial court of Massachusetts in *Smith v. Railway Co.*, 6 Allen, 203.' And to show that Chief Justice Cofer did not intend this conclusion to be based on the doctrine of eminent domain, he adds: 'And, in our opinion, may be sustained upon another ground equally, if not more satisfactory.' This other ground, he goes on to show, is the right of eminent domain. Judge Redfield says: 'A legislature may, nevertheless, allow other persons, either natural or corporate, to do a similar business in the same streets, or to do it upon the tracks of an existing company, by making compensation to another company when in their judgment the public good requires it. In the one case, the grant, being wholly independent, is understood to be made because the amount of the travel is supposed to require two modes of conveyance, and in the other the compensation is regarded as equivalent to the use.' 1 Redf. R. R. 318.

"Streets are opened and maintained for public travel and commerce. A street railway is almost universally held to be a legitimate use of the street, and its construction imposes no additional servitude upon the soil it occupies, so as to entitle proprietors abutting on the street to compensation. *Jersey City & B. R. Co. v. Jersey City & H. H. R. Co.*, 20 N. J. Eq. 61, and cases cited. Its tracks form a part of the street for the ordinary use of the public. It is required to construct its road-bed so as to obstruct public travel as little as possible. It has a license to put its rails down in secure and permanent form for the operation of its cars. The operation of its railway is the exercise of the public right of way over the street. The city has no power to grant the street, or a franchise in the street, for a private purpose; and the city has no power, without special authority from the state, to grant an exclusive right to a street railway company to use the street. 'It is impossible to foretell what changes in the manner of using streets may be occasioned by improvements in the modes of travel, or what modifications in the use of the modes now employed may be required by the increase in population and trade, or by the shifting of the centers of business and the routes of travel from one part of a city to another. The necessities and convenience of the public may require to-day but a single street railway, but circumstances may be so changed in half a score of years as to require many lines. From their nature and purpose for which they are used, street railways must be confined to streets or other public thoroughfares, where the space that can be occupied by them is neces-

narly limited. It may be impossible to meet the demands of the situation, unless new routes, made necessary since the establishment of old ones, can be extended over some portions of streets already occupied by old ones and it may be equally impossible, without unduly interfering with other uses of the streets, equally necessary to public convenience and comfort, to give such street railway company a separate track throughout the length of its line.' *Covington Ry. Co. v. Covington & C. Ry. Co.*, 19 Amer. Law Reg. 765.

" 'The city council may, in the exercise of the power delegated to the corporation in the control and regulation of streets, grant to one company the right of way over them, and afterward grant the right of way over a part of the same railway to another company. The city council is without power to grant the exclusive use of a street which belongs to the public to a railroad company. It cannot thus deprive succeeding councils of the power of performing the duty of regulating the streets as may seem to them to be for the best interest of the public.' *Canal & C. St. R. Co. v. Crescent City R. Co.* (La.), 6 South. Rep. 850. The development of rapid transit by means of street railways has been in the last decade most wonderful. 'They are now almost indispensable, and their chief value to the many consists in their being in the public streets, and along the shops and places of business. They are but a means of using the public streets to a greater advantage for the very purpose for which they were laid out — free and quick transit from one part to another. They are the best and cheapest mode yet devised, and they do not hinder the use of the street for public travel.' 20 N. J. Eq. 61. The companies constructing these ways, however, have valuable property rights in them not held by the general public. They have the right of way on the tracks. They have a property right in the material of which the road is constructed. 'Such material in place is as strictly private property of the corporation as it was before it was placed, save in this only, that, having been placed in a public street, it was thereby dedicated to the ordinary use of the public; but as a railroad such material remains the private property of the company, and for such purpose it is subject to the use and control of the owner exclusively. *Kinsman St. R. Co. v. Broadway & N. St. R. Co.*, 36 Ohio St. 239. These companies also have a property right in the franchises granted which ought to be and are protected against spoliation.

" 'Every principle of justice and equity, as well as the dictates of common honesty, demand and require that the state, or the municipalities acting under state authority, should protect the franchise and property rights of street-railway companies. While this is true, however, the public has rights also which ought to be scrupulously guarded and maintained. As facilities for rapid transit increase, and as the cost of transportation decreases, travel increases, and as travel increases the demand for more routes of travel increases. Companies, having invested their means in these lines, ought to receive fair compensation for their outlay and work, and yet the state ought to see that the means of fair competition are maintained. If there is one tendency of our times more marked than another, it is the tendency to monopoly and concentration of corporate power. This tendency had become so marked in 1875 and 1876 that the people of the state in their constitution, and the people of St. Louis in their charter, provided the most stringent measures to restrict and

IN ERROR to the court of appeals of the state of Kentucky.

W. W. MacFarland for plaintiff in error. *J. P. Helm* for the commonwealth.

BRADLEY, J. This case arose at Frankfort, Franklin county, Ky., upon an indictment found against Crutcher, the plaintiff in error, in the Franklin circuit court, for acting and doing business as agent for the United States Express Company, alleged to be an express company not incorporated by the laws of Kentucky, but trading and doing business as a common carrier by express of goods, merchandise, money and other things of value in and through the county and state aforesaid, without having any license so to do either for himself or the company. Crutcher, being arrested and brought before the court, tendered a special plea setting forth the facts with regard to his employment and the business of the company, and, among other things, that said company was a joint-stock company, incorporated and having its principal office in the city of New York in the state of New York, which plea was refused. He then pleaded "not guilty," and the parties filed an agreed statement of facts; and by consent the matters of law and fact were submitted to the court, and the defendant was found guilty and sentenced to pay a fine of \$100 and the costs of prosecution. The agreed statement of facts was as follows: "It is agreed that the defendant is agent of the United States Express Company, a foreign corporation doing the business ordinarily done by express companies in this country, of carrying goods and freight for hire, not only from points in this state to other points in this state, but also of carrying same character of freight from points within this state to points without this state, in divers parts of the United States, and *vice versa*. And defendant, agent at Frankfort, Ky., never obtained any license to do such business, nor did said express company obtain any license from the state of Kentucky. The proportion of business done by the said company within and without this state for the month of November, 1888, is shown by a statement herewith filed, marked 'X,' and the same proportion of business within and without this state, approximately, is generally done by said company." The detailed statement referred to, marked "X," showed the total amount of business done

by the company at the Frankfort office in November, 1888, to have been \$226.71, of which \$56.14, or not quite one-fourth of the whole, was business done entirely within the state; and the remainder, \$170.57, was done partly within and partly without the state; that is, the goods were brought into the state from places without the state, or were carried from the state to places without the state. Of course the latter, or largest, portion was comprised within the category of interstate commerce. The defendant upon these facts moved for a new trial, which was refused, and also for an arrest of judgment, which was denied, and a bill of exceptions was taken.

The case was then appealed to the court of appeals of Kentucky, and the judgment was affirmed. The ground taken for reversing the judgment was that the statute of Kentucky under which the indictment was found was repugnant to the power given to congress by the constitution of the United States to regulate commerce among the several states.

The law in question was passed in 1860, and is as follows: "An act to regulate agencies of foreign express companies: § 1. Be it enacted by the general assembly of the commonwealth of Kentucky, that it shall not be lawful, after the 1st day of May, 1860, for any agent of any express company, not incorporated by the laws of this commonwealth, to set up, establish or carry on the business of transportation in this state, without first obtaining a license from the auditor of public accounts to carry on such business. § 2. Before the auditor shall issue such license to any agent of any company incorporated by any state of the United States, there shall be filed in his office a copy of the charter of such company, and a statement made, under oath of its president or secretary, showing its assets and liabilities, and distinctly showing the amount of its capital stock, and how the same has been paid, and of what the assets of the company consist, the amount of losses due and unpaid by said company, if any, and all other claims against said company or other indebtedness, due or not due; and such statement shall show that the company is possessed of an actual capital of at least \$150,000, either in cash or in safe investment, exclusive of stock notes. Upon the filing of the statement above provided, and furnishing the auditor with satisfactory evidence of such capital, it shall be his duty to issue license

to such agent or agents as the company may direct to carry on the business of expressing or transportation in this state.

§ 3. Before the auditor shall issue license to any agent of any express or transportation company incorporated by any foreign government, or any association or partnership acting under the laws of any foreign government, there shall be filed in his office a statement setting forth the act of incorporation or charter, or the articles of association, or by-laws under which they act, and setting forth the matters required by the preceding section of this act to be specified; and satisfactory evidence shall be furnished to the auditor that such company has on deposit in the United States, or has invested in the stock of some one or more of the United States, or in some safe, dividend-paying stocks in the United States, the sum of \$150,000, which statement shall be verified by the oath of the president of such company, its general agent in the United States, or the agent applying for such license; and upon the due filing of such statement and furnishing the auditor with satisfactory evidence of such deposit or investment, it shall be his duty to issue such license to the agent or agents applying for the same.

§ 4. The statements required by the foregoing sections shall be renewed in each year thereafter, either in the months of January or July; and the auditor, on being satisfied that the capital or deposit, consisting of cash securities or investments as provided in this act, remain secure to the amount of \$150,000, shall renew such license." "§ 8. Any person who shall set up, establish, carry on or transact any business for any transportation or express company not incorporated by the law of this state, without having obtained license as by this act required, or who shall in any way violate the provisions of this act, shall be fined for every such offense not less than \$100 nor more than \$500, at the discretion of a jury, to be recovered as like fines in other cases. § 9. For any license issued by the auditor under this act, and for each renewal thereof, he shall be allowed the sum of \$2.50, to be paid by the agent or company taking out such license.

An amendatory act passed in 1866 raised the license fee to \$5, and imposed a fee of \$5 for filing copy of charter, and \$10 for filing an original or annual statement. The supreme court of Kentucky, in disposing of the case, gave the following opinion

(Crutcher v. Commonwealth, 12 S. W. Rep'r, 141): "It seems to us that the case of Woodward v. Com., 7 S. W. Rep'r, 613, in which the statute appears in full (decided by this court at its last term), determines the question now presented. Counsel for the appellant now claims that the statute of this state is invalid, as its effect is to regulate commerce among the several states. The agent of the express company was fined for not paying to the auditor a fee of \$5, or, rather, for failing to take out a license required by the act regulating the agencies of foreign express companies, passed in March, 1860, and amended by the act of 1866. That the company of which the appellant is agent is a corporation created by the laws of New York, doing business in this state as a carrier of goods, wares and merchandise, is conceded; and that it transports goods, etc., out of the state into other states, and all other species of property usually incident to such transportation, is admitted, both into the state and out of it. It appears that at least fifty per cent of the business done by this agent consists in the carrying of goods from the place of his agency, Frankfort, to other states. That the carrying and transportation of goods from one state to another is a branch of interstate commerce is not controverted, but it is claimed that there is nothing in the legislation imposing on those who desire to act as the agents of this foreign corporation the burden of paying to the auditor the fee of \$5 for recording his agency, or, rather, for issuing him his license to act as such.

The statute was enacted for the benefit of the citizens of the state, under which the auditor is required to have satisfactory evidence of the ability and solvency of the corporation to do that which it has undertaken to do by virtue of its act of incorporation. Those who intrust to its custody the transportation of their property are entitled to some security that its undertaking will be performed, and we find no law of congress or any constitutional provision that would deny to the state the right to impose such a burden upon those who undertake the discharge of such responsible duties. There is no discrimination made between corporations doing a like business; and the state, although the appellant's company is a foreign corporation, has the same right to license the business and calling of this agent as it would that of the lawyer or merchant whose business is confined to the state alone." The

court then referred to the cases of *Smith v. Alabama*, 124 U. S. 465; 8 Sup. Ct. Rep'r, 564, and to *Railway Co. v. Alabama*, 128 U. S. 96; 9 Sup. Ct. Rep'r, 28, and concluded as follows: "We cannot perceive how any burden has been placed by the state upon interstate commerce by the provisions of the enactment in question and must, therefore, affirm the judgment." We regret that we are unable to concur with the learned court of appeals of Kentucky in its views on this subject. The law of Kentucky which is brought in question by the case requires from the agent of every express company not incorporated by the laws of Kentucky a license from the auditor of public accounts before he can carry on any business for said company in the state. This of course embraces interstate business as well as business confined wholly within the state. It is a prohibition against the carrying on of such business without a compliance with the state law. And not only is license required to be obtained by the agent, but a statement must be made and filed in the auditor's office showing that the company is possessed of an actual capital of \$150,000 either in cash or in safe investments, exclusive of stock notes. If the subject was one which appertained to the jurisdiction of the state legislature, it may be that the requirements and conditions of doing business within the state would be promotive of the public good. It is clear, however, that it would be a regulation of interstate commerce in its application to corporations or associations engaged in that business; and that is a subject which belongs to the jurisdiction of the national and not the state legislature. Congress would undoubtedly have the right to exact from associations of that kind any guaranties it might deem necessary for the public security and for the faithful transaction of business; and as it is within the province of congress it is to be presumed that congress has done or will do all that is necessary and proper in that regard. Besides, it is not to be presumed that the state of its origin has neglected to require from any such corporation proper guaranties as to capital and other securities necessary for the public safety. If a partnership firm of individuals should undertake to carry on the business of interstate commerce between Kentucky and other states, it would not be within the province of the state legislature to exact conditions on which they should carry on their business, nor to require them to take out a license therefor.

The right of interstate commerce is not a franchise or a privilege granted by the state; it is a right which every citizen of the United States is entitled to exercise under the constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, unless Congress should see fit to interpret some contrary regulation on the subject.

It has frequently been laid down by this court that the power of Congress over interstate commerce is as absolute as it is over foreign commerce. Would any one pretend that a state legislature could prohibit a foreign corporation — an English or a French transportation company for example — from coming into its borders, and landing goods and passengers at its wharves, and soliciting goods and passengers for a return voyage, without first obtaining a license from some state officer, and filing a sworn statement as to the amount of its capital stock paid in? And why not? Evidently because the matter is not within the province of state legislation, but within that of national legislation. *Steamship Co. v. Tinker*, 94 U. S. 235. The prerogative, the responsibility and the duty of providing for the security of the citizens and the people of the United States in relation to foreign corporate bodies or foreign individuals with whom they may have relations of foreign commerce, belong to the government of the United States, and not to the governments of the several states; and confidence in that regard may be reposed in the national legislature without any anxiety or apprehension arising from the fact that the subject-matter is not within the province or jurisdiction of the state legislatures. And the same thing is exactly as true with regard to interstate commerce as it is with regard to foreign commerce. No difference is perceivable between the two. *Telegraph Co. v. Texas*, 105 U. S. 460; *Ferry Co. v. Pennsylvania*, 114 U. S. 196, 205, 211; 5 Sup. Ct. Rep'r, 826; *Steamship Co. v. Pennsylvania*, 122 U. S. 326, 342; 7 Sup. Ct. Rep'r, 1118; *McCall v. California*, 136 U. S. 104, 110; 10 Sup. Ct. Rep'r, 881; *Railroad Co. v. Pennsylvania*, 136 U. S. 114, 118; 10 Sup. Ct. Rep'r, 958. As was said by Mr. Justice Lamar, in the case last cited: "It is well settled by numerous decisions of this court that a state cannot under the guise of a license tax, exclude from

its jurisdiction a foreign corporation engaged in interstate commerce, or impose any burdens upon such commerce within its limits." We have repeatedly decided that a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it. *Pickard v. Car Co.*, 117 U. S. 34; 6 Sup. Ct. Rep'r, 635; *Robbins v. Taxing Dist.*, 120 U. S. 489; 7 Sup. Ct. Rep'r, 592; *Leloup v. Port of Mobile*, 127 U. S. 640; 8 Sup. Ct. Rep'r, 1380; *Asher v. Texas*, 128 U. S. 129; 9 Sup. Ct. Rep. 1; *Stontenburgh v. Hennick*, 129 U. S. 141; 9 Sup. Ct. Rep. 256; *McCall v. California*, 136 U. S. 104; 10 Sup. Ct. Rep. 881; *Railroad Co. v. Pennsylvania*, 136 U. S. 114; 10 Sup. Ct. Rep. 958.

As a summation of the whole matter it was aptly said by the present chief justice in *Lyng v. Michigan*, 135 U. S. 161, 166; 10 Sup. Ct. Rep'r, 725: "We have repeatedly held that no state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to congress."

We do not think that the difficulty is at all obviated by the fact that the express company, as incidental to its main business (which is to carry goods between different states), does also some local business by carrying goods from one point to another within the state of Kentucky. This is probably quite as much for the accommodation of the people of that state as for the advantage of the company. But whether so or not, it does not obviate the objection that the regulations as to license and capital stock are imposed as conditions on the company's carrying on the business of interstate commerce, which was manifestly the principal object of its organization. These regulations are clearly a burden and a restriction upon that commerce. Whether intended as such or not, they operate as such. But taxes or license fees, in good faith imposed exclusively on express business carried on wholly within the state, would be open to no such objection. The case is entirely different from that of foreign corporations seeking to do a business which does not belong to the regulating power of

congress. The insurance business, for example, cannot be carried on in a state by a foreign corporation without complying with all the conditions imposed by the legislation of that state. So with regard to manufacturing corporations, and all other corporations whose business is of a local and domestic nature, which would include express companies whose business is confined to points and places wholly within the state. The cases to this effect are numerous. *Bank v. Earle*, 13 Pet. 519; *Paul v. Virginia*, 8 Wall. 168; *Insurance Co. v. Massachusetts*, 10 Wall. 566; *Manufacturing Co. v. Ferguson*, 113 U. S. 727; 5 Sup. Ct. Rep'r, 739; *Fire Assn. v. People*, 119 U. S. 110; 7 Sup. Ct. Rep'r, 108. But the main argument in support of the decision of the court of appeals is that the act in question is essentially a regulation made in the fair exercise of the police power of the state. But it does not follow that every thing which the legislature of a state may deem essential for the good order of society and the well-being of its citizens can be set up against the exclusive power of congress to regulate the operations of foreign and interstate commerce.

We have lately expressly decided in the case of *Leisy v. Hardin*, 135 U. S. 100; 10 Sup. Ct. Rep'r, 681, that a state law prohibiting the sale of intoxicating liquors is void when it comes in conflict with the express or implied regulation of interstate commerce by congress, declaring that the traffic in such liquors as articles of merchandise between the states shall be free. There are, undoubtedly, many things which in their nature are so deleterious or injurious to the lives and health of the people as to lose all benefit of protection as articles or things of commerce, or to be able to claim it only in a modified way. Such things are properly subject to the police power of the state. Chief Justice Marshall, in *Brown v. Maryland*, 12 Wheat. 419, 443, instances gunpowder as clearly subject to the exercise of the police power in regard to its removal and the place of its storage; and he adds: "The removal or destruction of infectious or unsonnd articles is, undoubtedly, an exercise of that power, and forms an express exception to the prohibition we are considering. Indeed, the laws of the United States expressly sanction the health laws of a state." Chief Justice Taney, in the *License Cases*, 5 How. 504, 576, took the same distinction when he said: "It has, indeed, been suggested that, if a state deems the traffic in ardent spirits to be in-

injurious to its citizens, and calculated to introduce immorality, vice and pauperism into the state, it may constitutionally refuse to permit its importation, notwithstanding the laws of congress; and that a state may do this upon the same principles that it may resist and prevent the introduction of disease, pestilence and pauperism from abroad. But it must be remembered that disease, pestilence and pauperism are not subjects of commerce, although sometimes among its attendant evils. They are not things to be regulated and trafficked in, but to be prevented, as far as human foresight or human means can guard against them. But spirits and distilled liquors are universally admitted to be subjects of ownership and property, and are, therefore, subjects of exchange, barter and traffic, like any other commodity in which a right of property exists." But while it is only such things as are clearly injurious to the lives and health of the people that are placed beyond the protection of the commercial power of congress, yet when that power, or some other exclusive power of the federal government, is not in question, the police power of the state extends to almost every thing within its borders — to the suppression of nuisances; to the prohibition of manufactures deemed injurious to the public health; to the prohibition of intoxicating drinks their manufacture or sale; to the prohibition of lotteries, gambling, horse-racing or any thing else that the legislature may deem opposed to the public welfare. *Bartemeyer v. Iowa*, 18 Wall 129; *Beer Co. v. Massachusetts*, 97 U. S. 25; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659; *Stone v. Mississippi*, 101 U. S. 814; *Foster v. Kansas*, 112 U. S. 201; 5 Sup. Ct. Rep'r 8, 97; *Mugler v. Kansas*, 123 U. S. 623; 8 Sup. Ct. Rep'r, 273; *Powell v. Pennsylvania*, 127 U. S. 678; 8 Sup. Ct. Rep'r, 992, 1257; *Kidd v. Pearson*, 128 U. S. 1; 9 Sup. Ct. Rep'r, 6; *Kimmish v. Ball*, 129 U. S. 217; 9 Sup. Ct. Rep'r, 277.

It is also within the undoubted province of the state legislature to make regulations with regard to the speed of railroad trains in the neighborhood of cities and towns; with regard to the precautions to be taken in the approach of such trains to bridges, tunnels, deep cuts and sharp curves; and, generally, with regard to all operations in which the lives and health of people may be endangered — even though such regulations affect to some extent the operations of interstate commerce. Such regulations are emi-

nently local in their character, and, in the absence of congressional regulations over the same subject, are free from all constitutional objections, and unquestionably valid.

In view of the foregoing considerations, and of the well-considered distinctions that have been drawn between those things that are and those things that are not within the scope of commercial regulation and protection, it is not difficult to arrive at a satisfactory conclusion on the question now presented to us. The character of police regulation, claimed for the requirements of the statute in question, is certainly not such as to give them a controlling force over the regulations of interstate commerce which may have been expressly or impliedly adopted by congress, or such as to exempt them from nullity when repugnant to the exclusive power given to congress in relation to that commerce. This is abundantly shown by the decisions to which we have already referred, which are clear to the effect that neither licenses nor indirect taxation of any kind, nor any system of state regulation, can be imposed upon interstate, any more than upon foreign, commerce; and that all acts of legislation producing any such result are, to that extent, unconstitutional and void. And as, in our judgment, the law of Kentucky now under consideration, as applied to the case of the plaintiff in error, is open to this objection, it necessarily follows that the judgment of the court of appeals must be reversed. The judgment is reversed accordingly, and the cause remanded for further proceedings not inconsistent with this opinion.*

Fuller, C. J., and Gray, J., dissent.

Brown, J., not having been a member of the court when the case was argued, took no part in the decision.

Interstate commerce — taxation. — As to the effect of the interstate commerce provision of the federal constitution upon various forms of state taxation, see generally *Fitzgerald v. Grand Trunk R. Co.*, ante, p. 361; *Pullman's Palace-Car Co. v. Pennsylvania*, ante, p. 418, and cases referred to in notes to said cases. The following recent decisions in reference to interstate commerce are briefly referred to: License tax cases, *McLaughlin v. South Bend*, 126 Ind. 471; 26 N. E. Rep'r, 185; *Wrought Iron Range Co. v. Johnson*, 84 Ga. 754; 11 S. E. Rep'r, 283; *Rothermel v. Meyerle*, 136 Penn. St. 250; 20 Atl. Rep'r, 583. Meat inspection laws, *State v. Barber* 136 U. S. 313; 10 Sup.

* Reported in 11 Sup. Ct. Rep'r, 361; 141 U. S. 47.

Ct. Rep'r, 863; *Brimmer v. Rebman*, 138 U. S. 78; 11 Sup. Ct. Rep'r, 213; *State v. Klein*, 126 Ind. 68; 25 N. E. Rep'r, 878.

The statute of Maine (Rev. Stat., chap. 34, § 50) requiring common carriers who bring into the state persons not having a settlement therein to remove them beyond the state if they fall into distress within a year, etc., is a regulation of foreign and interstate commerce, and is in violation of article 1, section 8, clause 3, of the constitution of the United States, and is, therefore, void. *City of Bangor v. Smith*, 83 Me. 422; 23 Atl. Rep'r, 379.

A steamboat while engaged in carrying passengers on the Ohio river from one Indiana town to another is not engaged in interstate commerce, though the voyage begins and ends at a city in Kentucky. *Dugan v. State*, 125 Ind. 130; 25 N. E. Rep'r, 171.

UNION PACIFIC RY. CO. v. BOTSFORD.

(Supreme Court of the United States, May 25, 1891.)

1. RAILROAD COMPANIES. ACCIDENT CASES. PHYSICAL EXAMINATION OF PLAINTIFF. Under the common law, the courts of the United States have no power, in an action for personal injuries, to order before the trial an examination of the body of the injured person.

2. Revised Statutes of the United States, sections 861, 863, provide that the mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided. The only power of discovery conferred by congress (Rev. Stat., § 724) is to require the parties to produce books or writings in their possession or power in cases where they might be compelled to produce the same by the ordinary rules of proceedings in chancery. Held, that such statutes do not authorize such examination.

3. Revised Statutes, section 914, providing that the practice, pleading and forms and modes of proceeding in the courts of each state are to be followed in actions at law in the courts of the United States held within the same state, does not apply to such examination.

IN ERROR to the circuit court of the United States for the district of Indiana.

The original action was by Clara L. Botsford against the Union Pacific Railway Company for negligence in the construction and care of an upper berth in a sleeping-car in which she was a passenger, by reason of which the berth fell upon her head, bruising and wounding her, rupturing the membranes of the brain and spinal cord, and causing a concussion of the same, resulting in great suffering and pain to her in body and mind, and in permanent and increasing injuries. Answer, a general denial. Three

days before the trial (as appeared by the defendant's bill of exceptions) "the defendant moved the court for an order against the plaintiff, requiring her to submit to a surgical examination, in the presence of her own surgeon and attorneys, if she desired their presence, it being proposed by the defendant that such examination should be made in manner not to expose the person of the plaintiff in any indelicate manner, the defendant at the time informing the court that such examination was necessary to enable a correct diagnosis of the case, and that without such examination the defendant would be without any witnesses as to her condition. The court overruled said motion, and refused to make said order, upon the sole ground that this court had no legal right or power to make and enforce such order." To this ruling and action of the court the defendant duly excepted, and after a trial, at which the plaintiff and other witnesses testified in her behalf, and which resulted in a verdict and judgment for her in the sum of \$10,000, sued out this writ of error.

John F. Dillon for plaintiff in error. *A. C. Harris* for defendant in error.

Mr. Justice GRAY, after stating the facts as above, delivered the opinion of the court.

The single question presented by this record is whether, in a civil action for an injury to the person, the court, on application of the defendant, and in advance of the trial, may order the plaintiff, without his or her consent, to submit to a surgical examination as to the extent of the injury sued for. We concur with the circuit court in holding that it had no legal right or power to make and enforce such an order. No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. As well said by Judge Cooley: "The right to one's person may be said to be a right of complete immunity; to be let alone." Cooley Torts, 29. For instance, not only wearing apparel, but a watch or a jewel, worn on the person, is, for the time being, privileged from being taken under duress for rent, or attachment on mesne process or execution for debt, or writ of replevin. 3 Bl. Comm. 8; Sunbolf

v. Alford, 3 Mees. & W. 248, 253, 254; Mack v. Parks, 8 Gray, 517; Maxham v. Day, 16 Gray, 213. The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel any one, and especially a woman, to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault and a trespass; and no order of process, commanding such an exposure or submission, was ever known to the common law in the administration of justice between individuals, except in a very small number of cases, based upon special reasons, and upon ancient practice, coming down from ruder ages, now mostly obsolete in England, and never, so far as we are aware, introduced into this country. In former times, the English courts of common law might, if they saw fit, try by inspection or examination, without the aid of a jury, the question of the infancy or of the identity of a party; or, on an appeal of mayhem, the issue of mayhem or no mayhem; and, in an action of trespass for mayhem, or for an atrocious battery, might, after a verdict for the plaintiff, and on his motion, and upon their own inspection of the wound, *super visum vulneris*, increase the damages at their discretion. In each of those exceptional cases, as Blackstone tells us, "it is not thought necessary to summon a jury to decide it," because "the fact, from its nature, must be evident to the court, either from ocular demonstration, or other irrefragable proof;" and, therefore, "the law departs from its usual resort, the verdict of twelve men, and relies on the judgment of the court alone." The inspection was not had for the purpose of submitting the result to the jury, but the question was thought too easy of decision to need submission to a jury at all." 3 Bl. Comm. 331-333.

The authority of courts of divorce, in determining a question of impotence as affecting the validity of a marriage, to order an inspection by surgeons of the person of either party, rests upon the interest which the public, as well as the parties, have in the question of upholding or dissolving the marriage state, and upon the necessity of such evidence to enable the court to exercise its jurisdiction, and is derived from the civil and canon law, as administered in spiritual and ecclesiastical courts, not proceeding in any respect according to the course of the common law. Briggs v. Morgan, 2 Hagg. Const. 324; 3 Phillim. Ecc. 325; Devanbagh

v. Devanbagh, 5 Paige, 554; Le Barron v. Le Barron, 35 Vt. 365. The writ *de ventre inspiciendo*, to ascertain whether a woman convicted of a capital crime was quick with child, was allowed by the common law, in order to guard against the taking of the life of an unborn child for the crime of the mother.

The only purpose, we believe, for which the like writ was allowed by the common law, in a matter of civil right, was to protect the rightful succession to the property of a deceased person against fraudulent claims of bastards, when a widow was suspected to feign herself with child in order to produce a supposititious heir to the estate, in which case the heir or devisee might have this writ to examine whether she was with child or not, and, if she was, to keep her under proper restraint till delivered. 1 Bl. Comm. 456; Bac. Abr., "Bastard, A." In cases of that class, the writ has been issued in England in quite recent times. In re Blakemore, 14 Law J. Ch. 336. But the learning and research of the counsel for the plaintiff in error have failed to produce an instance of its ever having been considered, in any part of the United States, as suited to the habits and condition of the people. So far as the books within our reach show, no order to inspect the body of a party in a personal action appears to have been made, or even moved for, in any of the English courts of common law, at any period of their history. The most analogous cases in England that have come under our notice are two in the common bench, in each of which an order for the inspection of a building was asked for in an action for work and labor done thereon, and was refused for want of power in the court to make or enforce it. In one of them, decided in 1838, counsel moved for an order that the plaintiff and his witnesses have a view of the building, and an inspection of the work done thereon; and stated that the object of the motion was to prevent great expense, to obviate the necessity of calling a host of surveyors, and to avoid being considered trespassers. Thereupon one of the judges said: "Then you are asking the court to make an order for you to commit a trespass;" and Chief Justice Tindal said: "Suppose the defendants keep the door shut; you will come to us to grant an attachment. Could we grant it in such a case? You had better see if you can find any authority to support you, and mention it to the court again." On a subsequent day, the counsel stated that he had not been able

to find any case in point, and, therefore, took nothing by his motion. *Newham v. Tate*, 1 Arn. 244; 6 Scott, 574.

In the other case, in 1840, the court discharged a similar order, saying: "The order, if valid, might, upon disobedience to it, be enforced by attachment. Then it is evidently one which a judge has no power to make. If the party should refuse so reasonable a thing as an inspection, it may be a matter of argument before the jury, but the court has no power to enforce it." *Turquand v. Strand Union*, 8 Dowl. 201; 4 Jur. 74. In the English common-law procedure act of 1854, enlarging the powers which the courts had before, and authorizing them, on the application of either party, to make an order "for the inspection by the jury, or by himself, or by his witnesses, of any real or personal property, the inspection of which may be material to the proper determination of the question in dispute," the omission to mention inspection of the person is significant evidence that no such inspection, without consent, was allowed by the law of England. *Tayl. Ev.* (8th ed.), §§ 502-504. Even orders for the inspection of documents could not be made by a court of common law, until expressly authorized by statute, except when the document was counted or pleaded on, or might be considered as held in trust for the moving party. *Tayl. Ev.*, §§ 1588-1595; 1 *Greenl. Ev.*, § 559.

In the case at bar it was argued that the plaintiff in an action for personal injury may be permitted by the court, as in *Mulhado v. Railroad*, 30 N. Y. 370, to exhibit his wounds to the jury in order to show their nature and extent, and to enable a surgeon to testify on that subject, and, therefore, may be required by the court to do the same thing, for the same purpose, upon the motion of the defendant. But the answer to this is that any one may expose his body if he chooses, with a due regard to decency, and with the permission of the court; but that he cannot be compelled to do so, in a civil action, without his consent. If he unreasonably refuses to show his injuries, when asked to do so, that fact may be considered by the jury as bearing on his good faith, as in any other case of a party declining to produce the best evidence in his power. *Clifton v. U. S.*, 4 How. 242; *Bryant v. Stilwell*, 24 Penn. St. 314; *Turquand v. Strand Union*, above cited. In this country the earliest instance of an order for the inspection of the body of the plaintiff in an action for a personal in-

jury appears to have been in 1868, by a judge of the superior court of the city of New York in *Walsh v. Sayre*, 52 How. Pr. 334, since overruled by decisions in general term in the same state. *Roberts v. Railroad*, 29 Hun, 154; *Neuman v. Railroad*, 50 N. Y. Super. Ct. 412; *McSwyny v. Railroad Co.*, 7 N. Y. Supp. 456. And the power to make such an order was peremptorily denied in 1873 by the supreme court of Missouri, and in 1882 by the supreme court of Illinois. *Loyd v. Railroad Co.*, 53 Mo. 509; *Parker v. Enslow*, 102 Ill. 272. Within the last fifteen years, indeed, as appears by the cases cited in the brief of the plaintiff in error,* a practice to grant such orders has prevailed in the courts of several of the western and southern states, following the lead of the supreme court of Iowa in a case decided in 1877.

The consideration due to the decisions of those courts has induced us fully to examine, as we have done above, the precedents and analogies on which they rely. Upon mature advisement, we retain our original opinion that such an order has no warrant of law. In the state of Indiana, the question appears not to be settled. The opinions of its highest court are conflicting and indecisive. *Kern v. Bridwell*, 119 Ind. 226, 229; 21 N. E. Rep'r, 664; *Hess v. Lowrey*, 122 Ind. 225, 233; 23 N. E. Rep'r, 156; *Railroad v. Bruner* (Ind.), 26 N. E. Rep'r, 178. And the only statute which could be supposed to bear upon the question simply authorizes the court to order a view of real or personal property which is the subject of litigation, or of the place in which any material fact occurred. Rev. Stat. Ind. 1881, chap. 2, § 538.

But this is not a question which is governed by the law or practice of the state in which the trial is had. It depends upon the power of the national courts, under the constitution and laws of the United States. The constitution, in the seventh amendment, declares that in all suits at common law, where the value in controversy shall exceed \$20, trial by jury shall be preserved. Congress has enacted that "the mode of proof in the trial of

* *Schroeder v. Railway Co.*, 47 Iowa, 375; *Turnpike Co. v. Bally*, 37 Ohio St. 104; *Railroad Co. v. Thul*, 29 Kans. 466; *White v. Railway Co.*, 61 Wis. 536; 21 N. W. Rep'r, 524; *Hatfield v. Railroad Co.*, 33 Minn. 130; 22 N. W. Rep'r, 176; *Stuart v. Havens*, 17 Neb. 211; 22 N. W. Rep'r, 419; *Owens v. Railroad Co.*, 95 Mo. 169; 8 S. W. Rep'r, 360; *Sibley v. Smith*, 46 Ark. 275; *Railroad Co. v. Johnson*, 72 Tex. 93; 10 S. W. Rep'r, 326; *Railroad Co. v. Childress*, 82 Ga. 719; 9 S. E. Rep'r, 602; *Railroad Co. v. Hill*, 90 Ala. 71; 8 South. Rep'r, 90.

actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided," and has then made special provision for taking depositions. Rev. Stat., §§ 861, 863 et seq. The only power of discovery, or inspection conferred by congress is to "require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery," and to nonsuit or default a party failing to comply with such an order. Rev. Stat., § 724. And the provisions of section 914, by which the practice, pleadings, and forms and modes of proceeding in the courts of each state are to be followed in actions at law in the courts of the United States held within the same state, neither restricts nor enlarges the power of these courts to order the examination of parties out of court. *Nudd v. Burrows*, 91 U. S. 426, 442; *Railroad Co. v. Horst*, 93 U. S. 291, 300; *Ex parte Fisk*, 113 U. S. 713; 5 Sup. Ct. Rep'r, 724; *Chateaugay Ore & Iron Co.*, 128 U. S. 544, 554; 9 Sup. Ct. Rep'r, 150.

In *Ex parte Fisk*, just cited, the question was whether a statute of New York, permitting a party to an action at law to be examined by his adversary as a witness in advance of the trial, was applicable after an action begun in a court of the state had been removed into the circuit court of the United States. It was argued that the object of section 861 of the Revised Statutes of the United States was to provide a mode of proof on the trial, and not to affect this proceeding in the nature of discovery, conducted in accordance with the practice prevailing in New York. 113 U. S. 717; 5 Sup. Ct. Rep'r, 724. But this court, speaking by Mr. Justice Miller, held that this was a matter of evidence, and governed by that section, saying: "Its purpose is clear to provide a mode of proof in trials at law, to the exclusion of all other modes of proof." "It is not according to common usage to call a party in advance of the trial at law, and subject him to all the skill of opposing counsel, to extract something which he may use or not as it suits his purpose." "Every action at law in a court of the United States must be governed by the rule or by the exceptions which the statute provides. There is no place for exceptions made by state statutes. The court is not at liberty to

adopt them, or to require a party to conform to them. It has no power to subject a party to such an examination as this." 113 U. S. 724; 5 Sup. Ct. Rep'r, 724. So we say here. The order moved for, subjecting the plaintiff's person to examination by a surgeon, without her consent and in advance of the trial, was not according to the common law, to common usage, or to the statutes of the United States. The circuit court, to adopt the words of Mr. Justice Miller, "has no power to subject a party to such an examination as this."

Judgment affirmed.

BREWSTER, J. (dissenting). Mr. Justice Brown and myself dissent from the foregoing opinion. The silence of common-law authorities upon the question in cases of this kind proves little or nothing. The number of actions to recover damages, in early days, was, compared with later times, limited; and very few of those difficult questions, as to the nature and extent of the injuries, which now form an important part of such litigations, were then presented to the courts. If an examination was asked, doubtless it was conceded without objection, as one of those matters the right to which was beyond dispute. Certainly the power of the courts and of the common-law courts to compel a personal examination was, in many cases, often exercised, and unchallenged. Indeed, wherever the interests of justice seemed to require such an examination, it was ordered. The instances of this are familiar; and in those instances the proceedings were, as a rule, adverse to the party whose examination was ordered. It would be strange that, if the power to order such an examination was conceded in proceedings adverse to the party ordered to submit thereto, it should be denied where the suit is by the party whose examination is sought. In this country the decisions of the highest courts of the various states are conflicting. This is the first time it has been presented to this court, and it is, therefore, an open question. There is here no inquiry as to the extent to which such an examination may be required, or the conditions under which it may be held, or the proper provisions against oppression or rudeness, nor any inquiry as to what the court may do for the purpose of enforcing its order. As the question is presented, it is only whether the court can make such an order.

The end of litigation is justice. Knowledge of the truth is essential thereto. It is conceded, and it is a matter of frequent occurrence, that in the trial of suits of this nature the plaintiff may make in the court-room, in the presence of the jury, any not indecent exposure of his person to show the extent of his injuries; and it is conceded, and also a matter of frequent occurrence, that in private he may call his personal friends and his own physicians into a room, and there permit them a full examination of his person, in order that they may testify as to what they see and find. In other words, he may thus disclose the actual facts to the jury if his interest require; but by this decision, if his interests are against such a disclosure, it cannot be compelled. It seems strange that a plaintiff may, in the presence of a jury, be permitted to roll up his sleeve and disclose on his arm a wound of which he testifies; but, when he testifies as to the existence of such a wound, the court, though persuaded that he is perjuring himself, cannot require him to roll up his sleeve, and thus make manifest the truth, nor require him, in the like interest of truth, to step into an adjoining room, and lay bare his arm to the inspection of surgeons. It is said that there is a sanctity of the person which may not be outraged. We believe that truth and justice are more sacred than any personal consideration; and if in other cases, in the interests of justice, or from considerations of mercy, the courts may, as they often do, require such personal examination, why should they not exercise the same power in cases like this, to prevent wrong and injustice?

It is not necessary, nor is it claimed, that the court has power to fine and imprison for disobedience of such an order. Disobedience to it is not a matter of contempt. It is an order like those requiring security for costs. The court never fines or imprisons for disobedience thereof. It simply dismisses the case or stays the trial until the security is given. So it seems to us that justice requires, and that the court has the power to order, that a party who voluntarily comes into court alleging personal injuries, and demanding damages therefor, should permit disinterested witnesses to see the nature and extent of those injuries, in order that the jury may be informed thereof by other than the plaintiff and his friends; and that compliance with such an order may be enforced by staying the trial or dismissing the case. For these reasons we dissent.*

* Reported in 11 Sup. Ct. Rep'r, 109; 141 U. S., 280.

Personal injury cases — physical examination of plaintiff. — The authorities upon this question are collected and reviewed in note to *Alabama Great Northern R. Co. v. Hill*, 3 Am. R. R. & Corp. Rep. 412. It seems to us that the dissenting opinion in the foregoing case presents the better and more reasonable rule of law. The vast number of personal injury suits which now crowd the dockets of our courts is a feature entirely unknown in the days when the "common law" was evolved. The prejudice of juries against corporations is well known. To submit such a case to a jury is practically equivalent to a verdict for the plaintiff. Verdicts of from \$10,000 to \$25,000 for "internal injuries" alone are of frequent occurrence. Cases of simulated or exaggerated injuries and sufferings come under the observation of every practitioner. This condition of things is a part of the history of the times of which courts may and should take notice. One of the great boasts of the common law is that it is not a system of hard and fast rules, like a code, but is capable of growth and change as new conditions arise. That a power residing in the courts to compel a physical examination of the plaintiff in cases of this character, is calculated to prevent fraud and imposition, and promote justice, cannot be denied. That this necessity was not felt and that no exact precedent for the practice can be found two hundred or a hundred years ago, is no reason why a precedent should not be made when the necessity of the times requires it.

KANSAS CITY, M. & B. R. Co. v. RILEY.

(Supreme Court of Mississippi, June 1, 1891.)

1. CARRIERS. REFUSING GOING COUPON FOR RETURN TRIP. EJECTING PASSENGER. Where the conductor of a railroad train returns to a passenger the wrong portion of a return-trip ticket, and another conductor on the return trip refuses to accept it after the mistake is explained to him, and ejects the passenger from the train, the railroad company is liable.

A PPEAL from circuit court, Lee county, L. E. Houston, judge.

Wallace Pratt, Gen. Sol., and *J. W. Buchanan* for appellant.
Blair & Stribling for appellee.

COOPER, J. On or about the 3d of September, 1889, the plaintiff with her husband purchased from the agent of appellant at Myrtle, two tickets for transportation over appellant's road to Blue Springs and return, Myrtle and Blue Springs being stations

on appellant's road. These tickets were handed to the conductor on the train running from Myrtle to Blue Springs, and by accident and mistake he returned to the passengers the wrong part of the tickets, giving to them that portion which called for transportation from Myrtle to Blue Springs, which he should have kept, and retaining that portion calling for passage from Blue Springs to Myrtle, which he should have returned to the passenger. The plaintiff went from Blue Springs to Sherman, another station on appellant's road, and on the 6th of September, being desirous of returning to Myrtle, she purchased a ticket from Sherman to Blue Springs and for the journey from that place to Myrtle tendered that portion of the round-trip ticket from Myrtle to Blue Springs that had been returned to her by the conductor on the 3d, but this ticket the conductor refused to accept, because it entitled the bearer to transportation from Myrtle to Blue Springs, but not from Blue Springs to Myrtle. The plaintiff had not before noticed the mistake that had been made by the other conductor, but then explained to the conductor of the train upon which she was traveling how it had occurred and insisted upon her right to be carried on the ticket. But this he declined and informed the plaintiff that she must either pay train fare, buy a ticket at Blue Springs when the train should reach that point, or leave the train at that point. The plaintiff and conductor testified to about the same facts as to what transpired until the train reached Blue Springs, at which point the conductor stated that plaintiff and her husband left the train upon his refusal to carry them on the tickets they then had, while the plaintiff testified that the conductor spoke to her in an angry manner and took her by the arm to put her off the train. At all events, the plaintiff left the train at Blue Springs with her husband and there remained until the following day and brings this suit for damages against the appellant. The jury awarded her damages in the sum of \$300 and from a judgment for that sum the defendant appeals.

The decisions are in direct and palpable conflict upon the liability of a common carrier for failure to transport a passenger under the circumstances named. In New York, Michigan, Illinois, Maryland, Ohio, Wisconsin, Connecticut, New Jersey, Massachusetts and North Carolina, it seems to have been decided that the ticket presented by the passenger is the only evidence of

his right to travel upon the train which can be recognized by the conductor; and that if, by reason of the negligence of other servants of the carrier, a wrong ticket has been given to the passenger, or the right ticket has been given to him, but erroneously taken from him, the passenger's right of action is for the wrong thus committed; and that he may not insist upon his right to travel on the wrong ticket, or without it, where it has been taken up, and recover damages for the refusal of the carrier to permit him to do so; and that the carrier may lawfully eject him from its train, using no more force than is necessary to that purpose. The authorities in support of this rule are found in the brief of counsel for appellant. On the other hand, it is held in Georgia and Indiana that the passenger is entitled to travel according to his real contract with the carrier, where the mistake in giving the proper ticket, or in taking up a proper one held by the passenger, is caused by the negligence of the servants of the carrier. In a more recent case in Michigan than those cited by appellant's counsel — *Hufford v. Railroad Co.* (Mich.), 31 N. W. Rep'r, 544 — the plaintiff had applied and paid for a ticket from Manton to Traverse City. The agent gave him a ticket previously issued for a ride from Sturgis to Traverse City. There was evidence tending to show that the ticket had been canceled by conductor's marks for a ride between Sturgis and Walton, and the trial court instructed the jury that "if they believed the ticket was punched, indicating to the conductor by the punch-mark that it had been used before between Grand Rapids and Walton, that would be evidence of an infirmity in the ticket, and the plaintiff would not be entitled to insist upon that ticket being received." This instruction was held to be erroneous, the court saying: "When the plaintiff told the conductor on the train that he had paid his fare, and stated the amount he had paid to the agent who gave him the ticket he presented, and told him it was good, it was the duty of the conductor to accept the statement of the plaintiff until he found out it was not true, no matter what the ticket contained in words, figures or other marks." The most remarkable thing about this decision is that it was made in the same case, upon the same facts, and between the same parties as that reported in 53 Mich. 118; 18 N. W. Rep'r, 580, in which, in an opinion delivered by Judge Cooley, it was held that, as between

the conductor and the passenger, "the ticket must be conclusive evidence of the extent of the passenger's right to travel." There is a class of cases somewhat analogous to the present one, in which, by a uniform course of decisions, so far as we are informed, it is held that the conductor must accept the statements of the passenger. We refer to those cases in which different rates are charged for one who has procured a ticket and one who pays upon the train. It is held that as a condition precedent to the exercise of this right to charge higher train rates, and to expel one refusing to pay them, a reasonable opportunity should be given by the carrier to the passenger to procure the ticket required, and that one to whom no such opportunity has been afforded, and who for refusing to pay the higher rate is expelled from the train, may recover damages therefor. Hutch. Carr., § 571, and authorities in note 2; *Forsee v. Railroad Co.*, 63 Miss. 66.

Without determining more upon this disputed question than is necessary for the decision of the case before us, it is sufficient to say that where, as here, the ticket in the hands of the passenger supports and confirms the truth of his statement, and no possible injury can result to the carrier by the conductor's accepting and acting thereon, he must so act, or refuse at the peril of inviting an action for damages against his principal if the statement be true. We do not decide that a person holding a ticket from Myrtle to Blue Springs has a right to ride from Blue Springs to Myrtle; but no real injury could result to the carrier in recognizing such right, for the distance is the same, and in the usual course of business as many trains pass in one direction as the other. What we do decide is that a passenger holding and attempting to use such ticket, under the circumstances disclosed in this record, and explaining to the conductor how the mistake occurred by which the ticket read in the wrong direction, makes such a reasonable and probable showing as entitles him to be dealt with as a passenger, and, therefore, that any regulation of the carrier authorizing the conductor of its trains to disregard such statement is unreasonable, and need not be submitted to by the passenger. We find no error in the record for which the judgment should be reversed, and it is affirmed.*

1. Ejecting passenger — extra fare regulations. — Before a railroad com-

* Reported in 9 So. Rep'r, 443; 66 Miss. 705.

[illegible][illegible][illegible][illegible]

4. Defendant did intend to pay fare after having grown up ticket — damages. A wife of defendant became a passenger in defendant's train and gave the conductor a ticket. The conductor afterward demanded his fare again and refused to let wife and wife's mother and that he had given him a ticket; whereupon the wife gave the conductor ten cents, which was all the money he had, but the agent would not let him to leave the train at a station short of his destination, whereupon he was obliged not to walk the rest of the way. Held, that judgment for \$ 7, was an excessive. *Indianaapolis etc., R. Co. v. Howerton, 137 Ind. 218, 26 N. E. 885, 72.*

9. *Dumagan* for threatened expulsion and extortion of additional fare.—Where a man had given a ticket for his passage, and the conductor afterwards demanded fare for the trip, and threatened to expel him if he did not pay, and engaged him with trying to beat his passage, and plaintiff paid the fare demanded, it was held that he was entitled to recover the additional fare and damages for the humiliation suffered and the indignity done him. *Pennsylvania Co. v. Bray*, 125 Ind. 220; 25 N. E. Rep'r, 490.

7. **Wrongful refusal of ticket — threatened expulsion — damages.**— When a conductor wrongfully refused a ticket and threatened expulsion unless fare was paid, and the passenger complied, it was held that nothing could be recovered for the humiliation and annoyance of having to borrow money to pay his fare or of being subjected to comments by his fellow-passengers. *Hoffman v. Northern Pac. R. Co.*, 45 Minn. 58; 47 N. W. Rep'r, 812.

8. **Exemplary damages for expulsion.**— A passenger is not entitled to exemplary damages for an unlawful ejection from a railroad train, accomplished without undue force, or unnecessary harshness and unaccompanied by insult, malice or willful wrong. *Tomlinson v. Wilmington, etc., R. Co.*, 107 N. C. 337; 12 S. E. Rep'r, 188. To same effect, *Hoffman v. Northern Pac. R. Co.*, 45 Minn. 58; 47 N. W. Rep'r, 812.

9. **Damages too remote — loss of job by delay.**— In an action for wrongful expulsion, damages resulting to the plaintiff from the loss of a job of work, occasioned by his delay at the station at which he was obliged to leave the train, held too remote to be considered. *Corsten v. Northern Pac. R. Co.*, 44 Minn. 454; 47 N. W. Rep'r, 49.

CARTER V. UNION PRINTING CO. ET AL.

(Supreme Court of Arkansas, June 12, 1891.)

1. **CORPORATIONS. RELEASE OF UNPAID SUBSCRIPTIONS TO INCREASE OF STOCK.** The original stock of \$10,000 of a corporation was paid for with machinery costing when new \$3,000, subject to a mortgage of \$2,000. A subscriber to three-fourths of an increase of \$20,000 in the capital stock paid therefor in property of questionable value, and gave \$3,500 of his stock to induce a person to subscribe for the other \$5,000 of the stock, and pay \$3,530 in cash on his subscription. Held, that a subsequent release by the corporation of the claim for \$1,470 under an agreement by which such stockholder surrendered his \$3,500 of stock, and took a mortgage for the \$3,530, and another person loaned the corporation \$1,470, secured by mortgage, was fraudulent and void against a creditor of the corporation.

2. **SUCH RELEASE VOID AS TO DEBTS EXISTING BEFORE NEW STOCK AUTHORIZED.** A fraudulent release by a corporation of an unpaid subscription to an increase in the capital stock of a corporation is void even against a debt arising before the increase.

3. **Such advance of \$1,470 having been treated as a loan at the time, and subsequently in mortgage foreclosure proceedings to which the stockholder was a party, it is too late to contend that it was in satisfaction of the unpaid subscription.**

A PPEAL from Pulaski chancery court, David W. Carroll, chancellor.

Morris M. Cohn for appellant. *House & Cantrell* and *Sanders & Watkins* for appellee Crossett.

HEMINGWAY, J. In February, 1886, the Union Printing Company was organized as a corporation with a paid capital stock of \$10,000. In June following, its stock was increased to \$30,000. Munro and Van Valen subscribed for \$15,000 of the new stock, and McMurtry for the remainder, they having given to him \$3,500 of their own to induce him to take his. He paid on the stock for which he subscribed \$3,530, and bound himself to pay the balance, \$1,470, on call. He became the president of the company, and continued as such until the 2d of September following, when his resignation was tendered and accepted. On the same day the following proceedings are shown by the minutes of the directors' meeting, to-wit: "Called meeting of the Board of Directors. Little Rock, Ark., September 2, 1886. At a meeting of the board of directors of the Union Printing Company, called by direction of the president, and held at its place of business on the 21st day of September, 1886, the following named directors were present: J. Erb, F. L. Munro and J. M. Wade. President A. McMurtry being absent, the vice-president took the chair and called the meeting to order. The reading of the minutes of the previous meeting was dispensed with. The following was read, and upon motion of Mr. J. Erb, was unanimously adopted: Whereas there has heretofore been issued to A. McMurtry certain stock in this corporation amounting to \$8,500, upon which the sum of \$5,000 purports to have been paid thereon, but in fact there has been but the sum of \$3,530 paid thereon, and leaving the sum of \$1,470 due and unpaid, and which was to be paid at the time of issue; and whereas the said McMurtry now fails and refuses to make such payment, but has offered and agreed to accept the sum \$3,530 as purchase of said stock; and whereas this corporation is in need of immediate funds, and can resell the said stock so as to realize the sum of \$1,470; Now, therefore, the said offer of said McMurtry is hereby accepted, and the president of the corporation is authorized and empowered to buy said stock, and have the same transferred to the corporation, * * * not for the purpose of retiring the same, but for the purpose of reissue and resale for the benefit of the concern. And the said president is hereby authorized and fully empowered to enter into, on the part of the company, such contract and negotiations, and to make such securities by mortgage of property of the concern, as will secure

to the said McMurtry the purchase-price of said stock, and will perfect the purchase of said stock, and to do and perform all such matters and things as in his judgment may be necessary to carry out the purpose of this resolution. Whereas, this corporation is in need of money to meet certain liabilities due therefrom: Now, therefore, be it resolved, that the president of this corporation be, and he is hereby authorized and fully empowered to borrow of any one who is willing to lend the same the sum of \$1,470, and to execute to such lender the obligation of this company, and to procure any and all securities, personal or otherwise, or to make a mortgage upon the property of this company, in such way and manner as may to him, the said president, seem right and proper to secure the said loan."

In pursuance of these resolutions the company borrowed \$1,470 from R. C. Lynch, a brother-in-law of McMurtry, and executed to Lynch and McMurtry's representatives, he having died, a mortgage on all its property to secure the sum so borrowed, as well as the amount agreed to be paid to McMurtry. About the time when the company was organized, the plaintiff entered into a contract with it whereby it became bound to pay him for service to be rendered. He subsequently brought suit for a breach of that contract, and on the 28th of November, 1888, recovered judgment in the sum of \$1,344.20. Execution was issued on the judgment, and returned *nulla bona*, whereupon this suit was brought for the purpose, among others, of requiring McMurtry's representatives to pay to plaintiff a sufficient part of the amount unpaid on his stock to satisfy the judgment. It appears that on the original stock of \$10,000 no cash was paid. The incorporators owned a lot of printing-presses and material, and this was contributed in payment for the original stock. The property contributed had been purchased for \$3,000, of which a balance of \$2,000 was unpaid, and secured by mortgage on the property. Before this suit was brought a suit had been instituted wherein a decree was rendered for the sale of the company's property under the two mortgages above referred to. A sale was had, and a sum realized insufficient to pay the first mortgage. Upon the hearing in this case the chancellor dismissed the bill, and the plaintiff has appealed.

In design and effect the transaction between McMurtry and the

company amounted to an agreement for a cancellation of his stock subscription by returning to him what he had paid in and releasing him from liability for unpaid installments. We proceed to inquire whether the company had the right, as against its creditors, to release him from his liability. If it had not this right, the plaintiff is entitled to recover the amount of such liability, and as counsel stated in the argument that it was sufficient to satisfy his claim, we may waive other questions discussed. The creditors of a corporation have a right to look to its property for the payment of their claims, and to object to any disposition of it in fraud of their rights; and this right extends as well to claims due it as to its property in possession. Upon this question the supreme court of the United States has used the following language: "The capital stock of an incorporated company is a fund set apart for the payment of its debts. It is a substitute for the personal liability which subsists in private copartnerships. When debts are incurred, a contract arises with the creditors that it shall not be withdrawn or applied otherwise than upon their demands, until such demands are satisfied. The creditors have a lien upon it in equity. If diverted, they may follow it as far as it can be traced, and subject it to the payment of their claims, except as against holders who have taken *bona fide* for a valuable consideration and without notice. It is publicly pledged to those who deal with the corporation, for their security. Unpaid stock is as much a part of this pledge, and as much a part of the assets of the company, as the cash which has been paid upon it. Creditors have the same right to look to it as to any thing else, and the same right to insist upon its payment as upon the payment of any other debt due to the company. As regards creditors, there is no distinction between such a demand and any other assets which may form a part of the property and effects of the corporation." *Sanger v. Upton*, 91 U. S. 56, 60, 61. That the rule announced is correct, is not controverted, but counsel argues that it does not apply to this case. The reason assigned for his contention is that plaintiff's debt was contracted before the stock was increased, and he argues as a correct legal proposition that the unpaid subscription of a stockholder is not held as a fund for the benefit of those creditors whose claims arose prior to the issuance of the stock and without reference to or reliance upon it. He

cites several cases in support of the rule contended for, but we do not think they go to the extent claimed. In those cases the corporations had parted with stock upon terms that gave them no claim against the subscribers, and it was held that, if a corporation issue new shares of stock after the claim of a creditor arose, he, not having dealt with the company on the faith of any capital represented by such shares, cannot insist on the contribution by the holders of a greater amount of capital than the corporation itself could claim from them. *First Nat. Bank v. Gustin Minerva Con. Min. Co.*, 42 Minn. 327; 44 N. W. Rep'r, 198. But they further hold that, if a stockholder were indebted to a corporation for unpaid installments of stock, this claim would be an asset of the company, which, in case the company became insolvent, any creditor might resort to for the purpose of satisfying his demand. *Id.*; *Coit v. Gold Amalgamating Co.*, 119 U. S. 343; 7 Sup. Ct. Rep'r, 231.

The distinction is illustrated in the case of *New Albany v. Burke*, 11 Wall. 96-106, where the court sustained a release of a claim for subscription, and Judge Strong, in delivering the opinion, said: "No doubt the subscribed capital stock of a corporation is a fund held by it in trust for its creditors, as is also all its other property, and, had the railroad company released, without equivalent consideration or given it away, its action would have been fraudulent, and might have been set aside by a court of equity." So we think the plaintiff may attack the release if it was fraudulent; and that conclusion brings us to the next inquiry: Was the company in such a condition financially as would entitle it to make a voluntary release of this claim, as against its creditors? If so, it could have made any other voluntary disposition of an equal amount of its property. As we view the evidence, it was not in a position to bestow bounty upon any one. It began business without a surplus, and had continued it without accumulation. For its original stock of \$10,000 it took a lot of mortgaged, second-hand printing-presses and machinery at three times its former cost, charged with a lien for two-thirds thereof. Upon an increase of its stock a subscriber who paid in property of questionable value gave \$3,500 of his stock to induce McMurtry to subscribe for \$5,000 of the stock and pay \$3,530 in cash on his subscription. The minutes of the directors' meeting

show that the company was in such financial straits that it was willing to release a claim for \$1,470 and mortgage its property for \$3,530 in order to acquire \$8,500 of its stock, and by sale of it realize \$1,470. These circumstances clearly foreshadowed the ultimate sale of its effects for a sum less than the paramount lien. If not absolutely insolvent, it was seriously embarrassed, and any gift of its property was prejudicial to its creditors. It is earnestly insisted that we should not determine this cause upon the ground of the company's insolvency when the release was made, because there was no allegation of such insolvency in the complaint. The complaint alleged that there was an unpaid balance upon McMurtry's subscription, and this was denied by the defendant. The proof clearly shows that there was an unpaid balance unless it was released by the transaction of September 2, and upon it the defendant must rely. To overcome the force of the defense, the plaintiff was at liberty to make any proof which tended to show that the release was invalid, among others, that it was executed in fraud of the company's creditors, and of this fact we think the proof is conclusive. But it is contended that the transaction was not prejudicial to the company's creditors, because, while it gave up a claim against McMurtry, it obtained an equivalent sum of money from Lynch. The reason assigned does not, it seems to us, justify the conclusion. In the first place, the loan from Lynch was an independent transaction with a different person, and has no bearing upon the arrangement with McMurtry; but, in the next place, if the money had been advanced by McMurtry, it could not change the result, for it was advanced and received as a loan, and not in payment of a liability. The company's note, secured by mortgage upon its property, was given for it, and a decree of foreclosure subsequently rendered upon it in a suit, to which McMurtry's representatives were parties. Having been treated as a loan, and charged upon the company's property, first by mortgage and afterward by decree, it is now too late to contend that it was a satisfaction of McMurtry's liability.

That the result will entail a hardship upon McMurtry's estate is probable, but that is not a consideration in determining the questions presented. It flows by the provisions of law from his relations with the company, and courts could not, if they would, change or restrain the effect of such provisions, designed as a

protection to those dealing with corporations. The judgment will be reversed, and a judgment rendered here for the amount of plaintiff's debt, with interest, and the cost of the action at law, provided it does not exceed the sum of \$1,470, with interest thereon at six per cent after the bringing of this suit. In such event, the recovery will be limited to the amount last stated.*

Subscriptions to stock — release or simulated payment — Liability of stockholder to creditors.—See *Clark v. Bever*, ante, p. 460, and note; *Handley v. Stutz*, ante, p. 482, and note; *Elyton Land Co. v. Birmingham Warehouse, etc., Co.*, ante, p. 590.

GARRETT V. WESTERN UNION TEL. CO.

(Supreme Court of Iowa, June 8, 1891.)

1. **TELEGRAPH COMPANIES. LIMITING LIABILITY. FAILURE TO SEND MESSAGE.** The statement printed on a telegraph blank, that the sender agrees that he will not claim damages for errors or delays or for non-delivery of the message, does not exonerate the company from liability for failing to send the message.

2. **CANNOT CONTRACT FOR EXEMPTION FROM LIABILITY FOR NEGLIGENCE.** Such a stipulation, in so far as it would operate to exempt the company from liability for the negligence of its operators and agents in sending or delivering the message, is void.

3. **WHETHER FORM OF MESSAGE GAVE SUFFICIENT NOTICE OF ITS IMPORTANCE.** A dealer in cattle living in Iowa wired his Chicago correspondent, "Send me market, Kansas City, to-morrow and next day." He had previously sent and received a great many messages from that office. Held, that it was a question for the jury whether the message charged the company with notice that the sender intended to act upon the result of it in buying or selling cattle at Kansas City.

4. **CONTRIBUTORY NEGLIGENCE.** The evidence showed that the sender of the message had an arrangement with his correspondent to the effect that, if there was no change in the market, the correspondent would not answer his telegram, and that on receiving no answer to the telegram the sender bought cattle relying upon the last price that had been sent him, but that he could have ascertained the market-price by other means. Held, that the question of whether he acted in a reasonably prudent manner should have been submitted to the jury and if he did not he could not recover.

A PPEAL from district court, Louisa county, W. R. Lewis, judge. Action to recover damages for failure to transmit and deliver a telegraphic message. There was a trial by jury, and

* Reported in — S. W. Rep'r, —.

a verdict and judgment for the plaintiff for sixty cents. Plaintiff appeals.

R. Caldwell and *L. A. Riley* for appellant. *Arthur Springer* for appellee.

ROTHBOCK, J. 1. The evidence in the case shows that the defendant is a resident of Louisa county, and that at the time of the wrongs complained of by him, and for some time before that, he had been in the business of buying and shipping live-stock to the Chicago market. His operations were not confined to his immediate neighborhood, but he bought and shipped on the Rock Island railroad, at points between Muscatine, Iowa, and Kansas City, Mo., and including those places. On the evening of the 28th day of June, 1888, he left his home in the country, and went to Columbus Junction, on the Chicago, Rock Island and Pacific railway and took passage for Kansas City. Before leaving Columbus Junction he wrote and delivered to the operator of the defendant at that station a message, of which the following is a copy: "June 28, 1888. To Gregory, Cooley & Co., U. S. Yards, Chicago: Send me market Kansas City, to-morrow and next day. A. M. Garrett." When he delivered the message to the operator he gave fifty cents in payment for its transmission. Plaintiff arrived in Kansas City about nine o'clock the next morning, and went to the stock-yards for the purpose of buying cattle. He went to the telegraph office in the stock exchange building several times, gave his name, and inquired for an answer to the message which he had sent the night before. He made these inquiries until two o'clock in the afternoon, and he then went into the stock-yards and bought one hundred and forty-seven cattle. At the time of his purchase the price of cattle in Chicago was fifty cents per hundred less than it was on the day before the plaintiff delivered the message to the defendant's agent at Columbus Junction. It appears in evidence that Gregory, Cooley & Co., to whom the message was addressed, was the commission firm which received, handled and sold the shipments of cattle made by the plaintiff, and had done so for several years; and the evidence shows that there was a business arrangement between the plaintiff and Gregory, Cooley & Co., by which they were to keep him advised by telegraph of the cattle market in Chicago. This arrangement was

as follows: If the plaintiff asked Gregory, Cooley & Co. for the state of the market by telegraph, and there was no change from the last report, no answer to the telegram was received, and plaintiff acted upon the last report. If there was a change, then Gregory, Cooley & Co. answered the telegram of plaintiff, by giving him the advance or decline on the previous report.

There is evidence tending to show that there was a report made by said commission firm to the plaintiff on the 27th day of June, 1888, and that plaintiff bought the cattle at Kansas City relying on that last report, and that, if his message had been sent, delivered and answered, he would not have made the purchase. The evidence tends quite strongly to show that the message was not sent from Columbus Junction and that it was on a hook in the office, and that no attempt was made by the operator to transmit it to Gregory, Cooley & Co. It is true there is some conflict in the evidence on this question, but, as it was material to the rights of the parties, it was a proper question to be submitted to the jury. It is shown, without conflict, that the message was not at any time delivered to Gregory, Cooley & Co. There is evidence to the effect that the Chicago market for cattle was posted on the bulletin boards at the stock exchange in Kansas City, and that, if the plaintiff had consulted these reports, he would have been advised of the decline in the market before he made his purchase; and two of the members of the firm of Gregory, Cooley & Co. testified on the trial as witnesses that, if the plaintiff's message had been received by them, they would have immediately answered it, and advised plaintiff of the decline in the market.

At the close of the introduction of the evidence, the court instructed the jury that, under the pleadings and the evidence, there could be no recovery by the plaintiff except for the sum paid by him for sending the message, and interest thereon at six per cent. Under this instruction the jury returned a verdict for sixty cents. There is nothing in the record showing upon what ground the jury were instructed that the plaintiff could not recover damages. The message which the plaintiff delivered to the operator was what is known as a "night message." It was written upon a blank furnished by the defendant. There was printed matter on the blank, and, among other words thereon, there was the following: "The Western Union Telegraph Company will receive messages

to be sent, without repetition, during the night, for delivery not earlier than the morning of the next ensuing business day, at reduced rates, but in no case for less than for twenty-five cents tolls, for a single message and upon the express condition that the sender will agree that he will not claim damages for errors or delays, or for non-delivery of such message, happening from any cause, beyond a sum equal to ten times the sum paid for transmission; and that no claim for damages shall be paid, unless presented in writing within thirty days after sending the message." Whatever right the defendant may have, if any, to limit its liability, or provide against the negligence of its agents in the transmission of messages, there can be no question that the language above quoted cannot be held to excuse the defendant for a failure to send the message, or to make the attempt to do so. The exemption provided for by the printed blank was for errors or delays, or non-delivery to the person to whom it was addressed and not for a failure to make an attempt to send it.

But suppose it be conceded that an attempt was made to send the message. The evidence shows without conflict that it was not at any time delivered, and the defendant fails to show that any effort was made to deliver it, to Gregory, Cooley & Co. In this state of the evidence, the restriction as to the liability of the defendant is no defense to the action, for the reason that the defendant cannot by contract limit its liability for the plain and palpable negligence of its operators and agents. The defendant cannot contract against its own negligence. This rule was announced by this court in *Sweatland v. Telegraph Co.*, 27 Iowa, 433; and we think it is now the settled law of this country. *Telegraph Co. v. Griswold*, 37 Ohio St. 301; *Tyler v. Telegraph Co.*, 60 Ill. 421; *Wolf v. Telegraph Co.*, 62 Penn. St. 83; *Telegraph Co. v. Gildersleve*, 29 Md. 232; *Ellis v. Telegraph Co.*, 13 Allen, 226; *Parks v. Telegraph Co.*, 13 Cal. 422; *Telegraph Co. v. Fontaine*, 58 Ga. 433; *Hibbard v. Telegraph Co.*, 33 Wis. 558; *Manville v. Telegraph Co.*, 37 Iowa, 214.

These and a large number of other cases which might be cited sustain this doctrine. It appears to us that the rule is eminently just. The contrary doctrine would, in effect, enable telegraph companies to undertake the transmission of messages, and by the

same contract exonerate themselves from all liability for failure to perform the service by reason of the carelessness or negligence of their agents or operators in failing to attempt to perform the service. It would be a marvellous doctrine to hold in this case that the defendant could fail to attempt to send the message as it contracted to do, and exonerate itself by paying back to the plaintiff the nominal sum it received for the service. If its liability is to be measured by that standard, its contract is a sham and a deception. It could perform or not perform, at its pleasure, and escape all liability for the consequences of non-performance.

The next question arising on the record is whether the form of the message was such as that the defendant can be properly chargeable with the alleged damages incurred by the plaintiff. It has often been said that a party who fails to perform a contract is liable for such damages as the parties to the contract may fairly and reasonably have apprehended would result from a breach. This does not mean that the parties to the contract contemplated the exact results. It is enough if it may fairly be found from the language of the contract, and the circumstances which were within the personal knowledge of the parties, that there might be serious consequences attending a breach of the contract. The message involved in this case did not appraise the defendant's agent at Columbus Junction, by its terms, that the plaintiff was on his way to Kansas City to purchase cattle, and that he would rely on the answer to the message in making his purchases. But it did, in effect, advise the agent that he was on his way to Kansas City, and that he desired market reports to be sent to him at that place. The evidence shows that plaintiff had sent and received a great many messages from that office. We think it was, to say the least, a proper question to submit to the jury to determine whether, in view of all the facts and circumstances surrounding the parties, the defendant ought to be charged with knowledge that the plaintiff intended to act upon the result of his message in buying or selling cattle, and that it pertained to transactions which might involve loss; and, as it appeared that by the arrangement between the plaintiff and Gregory, Cooley & Co., that no answer to the message was equivalent to an answer that the market was unchanged, the question of substantial damages should have been submitted to the jury.

3. The next question properly to be considered is whether the plaintiff, if he acted upon the fact that he received no message as equivalent to an answer that the market was unchanged, was entitled to have the jury consider whether he was damaged in a substantial manner. In other words, were the damages he claims the direct result of the defendant's failure to perform its contract, or were they remote and speculative: In the case of *Telegraph Co. v. Hall*, 124 U. S. 444; 8 Sup. Ct. Rep'r, 577, it appeared that Hall sent a message to his agent instructing him to buy for him ten thousand barrels of petroleum. Petroleum was at that time selling for \$1.17 per barrel, and the evidence showed that the agent would have bought at that price; but the telegram was delayed through the negligence of the telegraph company, and the price had advanced to \$1.35 per barrel when the message was actually received by the agent, and he did not buy. It was held that Hall could not recover the difference in the price of the oil, because he suffered no actual loss, and was entitled to nominal damages only. But that was unlike the case at bar. Here the jury should have been directed to determine whether the plaintiff acted upon his advices from his commission men, or, rather, the absence of a message from them, and, if he so acted and made a purchase, his loss was direct and proximate, and not remote and speculative. In the cited case it is said: "Where the negligence of the telegraph company consists, not in delaying the transmission of the message, but in transmitting it erroneously, so as to mislead the party to whom it is addressed, and on the faith of which he acts in the purchase or sale of property, the actual losses, based upon changes of market value, are clearly within the rule for estimating damages." See, also, *Turner v. Telegraph Co.*, 41 Iowa, 458. Under this rule, if the defendant's agent at Columbus Junction did not transmit the message, and the plaintiff acted upon the fact that he received no reply thereto, he would be entitled to recover such damages as he sustained by purchasing the cattle in the belief that his message had been transmitted.

4. It is urged in argument that the plaintiff should have protected himself by ascertaining the market value of cattle in Chicago before his purchase at Kansas City. This was a question for the jury. It was not a question of law to be determined by the court. If that feature of the case had been submitted to the

jury, and it had been found that the plaintiff, as a reasonably prudent man, ought not to have acted upon the message which he sent to Gregory, Cooley & Co., and his arrangement with them in reference to their correspondence by telegraph, then there could be no recovery. But the court submitted no question to the jury, and, for the reasons above pointed out, we think such a disposition of the case should have been made. *Reversed.**

1. **Delay in delivering message — damages — mental anguish.** — In an action by a father to recover damages for the delay of defendant telegraph company in transmitting a message to a physician, stating that plaintiff's child was very sick, and asking him to come at once, resulting in a delay of twelve hours, the mental anguish of the father is an element of damages, but not the sufferings of the child, or those of the other relatives. *Gulf, etc., Tel. Co. v. Richardson*, 79 Tex. 649. To same effect, *Thompson v. Western Union Tel. Co.*, 107 N. C. 449; 12 S. E. Rep'r, 427. Mental anguish as an element of damages in such cases is considered in note to *Young v. Western Union Tel. Co.*, 8 Am. R. R. & Corp. Rep. 193.

2. **Requiring claim for damages to be presented within a specified time.** — A stipulation upon a telegraphic blank providing that the company shall not be liable in damages, unless it is presented within thirty days from the sending of the message, is reasonable and valid. *Western Union Tel. Co. v. Culbertson*, 79 Tex. 65; 15 S. W. Rep'r, 219.

3. **Stipulation against liability for unrepeatd message.** — The stipulation on a telegraphic blank against liability for an unrepeatd message does not protect the company, where such message is negligently delayed in transmission. If such stipulation has any validity at all, it is only in cases of a mistake in transmitting, and then only when the negligence is slight. *Thompson v. Western Union Tel. Co.*, 107 N. C. 449; 12 S. E. Rep'r, 427.

4. **Regulation requiring deposit for delivery outside of free-delivery limits.** — A regulation of a telegraph company, printed on blanks, prescribing limits within which a message will be delivered free, and requiring a deposit to cover delivery charges if the message is to be delivered outside of the limits, is reasonable; and where the person to whom a message is addressed, lives outside the prescribed limits, it is incumbent on the sender of the message, who knows of the regulations, to ascertain the fact, and make the required deposit, and the illiteracy of the sender is no excuse for his failure to comply with such regulation. *Western Union Tel. Co. v. Henderson*, 89 Ala. 510; 7 So. Rep'r, 419.

5. **Message written on ordinary paper — facts showing no contract to send message.** — Mere delivery of a message written on a leaf torn from a blank-book, without any word spoken either by the plaintiff's messenger or the company's operator concerning the sending of the message, and an absence of any payment made or tendered of the price for transmission, is insufficient to create a liability against the company for failure to send such message. *Western Union Tel. Co. v. Liddell*, 68 Miss. 1; 8 So. Rep'r, 510.

* Reported in 49 N. W. Rep'r, 88.

6. Cipher dispatch — damages for failure to deliver.— The telegraph company is liable for the damages directly arising from its failure to deliver a message directing plaintiff's brokers to sell a quantity of cotton on his account for delivery at specified times, though the message was in cipher, and the company was not informed of its contents, nor of the fact of plaintiff's prior purchase of the same quantity of cotton to be delivered at the same time. *American Union Tel. Co. v. Daughtry*, 89 Ala. 191; 7 So. Rep'r, 660.

7. Mistake in message — damages — loss of situation.— One P. delivered a message to a telegraph company at its office at Papillion in this state, to be delivered to a person named at Kansas City, Mo. The message as transmitted was incorrect, whereby P. lost a promised situation, and sustained damages. Held, that the company was liable for the damages. *Kemp v. Western Union Tel. Co.*, 28 Neb. 661; 44 N. W. Rep'r, 1064.

8. Damages for mistake or neglect to send or deliver.— For rulings upon particular facts, see *Western Union Tel. Co. v. Andrews*, 78 Tex. 305; 14 S. W. Rep'r, 641; *Western Union Tel. Co. v. Kendzora*, 77 Tex. 257; 13 S. W. Rep'r, 986; *Western Union Tel. Co. v. Clifton*, 68 Miss. 307; 8 So. Rep'r, 746.

CHICAGO CITY RY. CO. v. WILCOX.

(Supreme Court of Illinois, June 15, 1891.)

1. STREET RAILROADS. INJURY TO CHILD ON TRACK. NEGLIGENCE OF PARENTS. Where a child of tender years is injured by the negligence of another, the negligence of his parents, even though present at the time of the accident, cannot be imputed to him so as to support the defense of contributory negligence to his suit for damages.

2. CONTRIBUTORY NEGLIGENCE OF CHILD. Where a child six years old, being about to cross a street on which are two cable tracks, waits until a train on the track nearest him has passed, and then going behind such train, is struck by another train coming from the opposite direction, his failure to see and avoid the train which struck him, and which was probably hidden from his view by the other train, does not constitute contributory negligence.

3. WHETHER NEGLIGENCE ATTRIBUTABLE TO A CHILD OF TENDER YEARS. An instruction to the effect that negligence cannot be imputed to the plaintiff on account of his tender age is not assignable as error where the evidence clearly shows that the jury could not have found him guilty of contributory negligence had that question been submitted to them.

A PPEAL from appellate court, first district.

C. M. Hardy for appellant. *E. F. Masterson* and *Charles E. Pope* for appellee.

BAILEY, J. This was an action on the case, brought by Frank

Wilcox, an infant, by his next friend, against the Chicago City Railway Company, to recover damages for a personal injury. The declaration alleges that on the 24th day of June, 1887, the plaintiff was passing along Harmon court in the city of Chicago, at its crossing over the defendant's railway on Wabash avenue; that the defendant, by its servants, was then and there running on said railway a train of cars drawn by cables running underneath the surface of said avenue, and that while the plaintiff, with all due care, was passing along Harmon court at said railway crossing, the defendant, by its servants, so carelessly and negligently managed and controlled said train of cars, without slackening the speed thereof or ringing a bell, that said train ran upon and struck the plaintiff with great force and violence, and so bruised and injured one of his legs as to render it necessary to amputate the same, thus rendering him a cripple for life. The defendant pleaded not guilty, and on trial the jury found a verdict for the plaintiff, and assessed his damages at \$15,000, and for that sum and costs the plaintiff had judgment. On appeal to the appellate court said judgment was affirmed (33 Ill. App. 450), and by a further appeal the record is now brought to this court for review.

The plaintiff at the time he was injured, was a child only six years of age, and was living with his father and step-mother on the south side of Harmon court, a few feet east of the corner of Wabash avenue. The evidence tends to show that just before the time of his injury he was on the southwest corner of Wabash avenue and Harmon court playing with two other boys, and that his step-mother had come out of her house, and was standing on the corner of the opposite side of Wabash avenue. That as she came out to the corner, the plaintiff called to her, and asked her if she wanted him, to which she replied: "No, you can stay there." That an acquaintance of Mrs. Carroll's coming along, she conversed with her for a few minutes, and then turned to go back to her house, and as she did so, the plaintiff called out: "Mamma, wait; I am coming." That she thereupon stopped, and stood waiting for the plaintiff, and as she did so she saw a train of cable-cars approaching from the north, and motioned to the plaintiff to wait until it had passed, which he did. That, as it passed, the plaintiff walked around the rear end of it, and was

immediately struck by another train coming from the south, and received his injury.

The only material question in the case open for consideration here arises upon the third instruction given to the jury at the instance of the plaintiff, which was as follows: "The court instructs the jury for the plaintiff that, if they, from the evidence, believe that the parents are working people, and that the father was not present at the time of the accident, and that the mother was attending to her usual occupation in attending their little store on Harmon court, in such event the law does not require that persons in their station of life shall keep constant watch over their children; nor can the want of such care be imputed to them as negligent conduct; nor can negligence be imputed to the child, on account of its age, he being seven years of age, or about that, at that time." This instruction incorrectly assumes that the plaintiff, at the time of his injury, was one year older than he really was. The trial was in November, 1888, and the evidence is that he was seven years of age the preceding June, which would make him but six years of age June 24, 1887, the date of his injury. But this erroneous assumption was more favorable to the defendant than the evidence warranted, and, therefore, affords the defendant no just ground of complaint. The instruction, also, while holding that under the facts supposed the negligence of the plaintiff's parents cannot be imputed to him, seems to be based upon the tacit assumption that, under proper circumstances, the rule of imputed negligence might apply. This assumption, if erroneous, was not prejudicial to the defendant, as the defense is based upon the assertion of that rule, as well as the assumption that it should be applied under the facts in this case. The instruction, then, so far as this portion of it is concerned, is free from any valid objection which the defendant can urge, if it can be shown either that under the facts supposed the negligence of the plaintiff's parents cannot be imputed to him, or that the doctrine of imputed negligence can have no application to a case of this character. We prefer to consider the latter of these two propositions, and the question then is whether the negligence of the plaintiff's parents, even if such negligence is proven, can be imputed to the plaintiff, so as to be available in support of the defense of contributory negligence.

Upon this question the decisions of the courts of the various states are very much in conflict. The leading case among those which hold that the negligence of a parent, custodian or one *in loco parentis* should be imputed to a child not capable of caring for his own safety, is *Hartfield v. Roper*, 21 Wend. 615, decided by the supreme court of New York in 1839. In that case the plaintiff, a child about two years old, was alone in a traveled portion of a highway some distance from any house. The defendant was driving a sleigh, and the child was run over by the horses and injured before the defendant or any of those in the sleigh saw him. The plaintiff having recovered a verdict, a new trial was granted on the grounds: First, that the evidence failed to show negligence on the part of the defendant; and, second, that negligence on the part of the plaintiff's parents was clearly shown. The court held that, although the child, by reason of his tender age, was incapable of using that ordinary care which is required of a discreet and prudent person, the want of such care on the part of his parents furnished the same answer to an action by the child as would the omission of such care by the plaintiff himself in an action by an adult. The reasoning of the court, embodied in an elaborate opinion by Mr. Justice Cowen, is, in substance, that the custody of the child was confided by law to its parents; that said child could not be exposed, as it was in that case, without gross negligence; that an adult injured by a collision could not recover if he had contributed to the injury; that the same rule was applicable to children, and could be enforced only by requiring care from those who have them in custody; that an infant is not *sui juris*, but belongs to his custodian; that the custodian is his agent, and the custodian's neglect is, therefore, his neglect. The rule thus established has been adhered to, with slight modifications, by the courts of New York, and has also been adopted by the courts of several of the other states, and is usually known as the "New York rule."

What is known as the "English rule" is declared in *Waite v. Railway Co.*, El., Bl. & El. 719. In that case the plaintiff, an infant about five years old, was in charge of his grandmother, who purchased tickets for both at a station, with the intention of taking the train to another point on said line of railway. In crossing the track to reach a platform they were run down by a train

under circumstances of concurrent negligence on the part of the grandmother and the servants of the company. The grandmother was killed, and the plaintiff was seriously injured. The court, in holding that no recovery could be had, repudiated the idea that there was any relation between the plaintiff and his grandmother akin to that of principal and agent, but placed its decision upon the theory that he and she were identified the same as though he had been in her arms. The decision turned upon the legal identity between the infant plaintiff and his custodian, and did not go beyond that class of cases in which the parent or custodian is present and controlling the infant at the time of the injury. In this country, in many of the states, the rule established by the case of *Hartfield v. Roper* has been seriously criticised and condemned. The leading case in which that rule is repudiated, and in which is established what has sometimes been called the "Vermont rule," is *Robinson v. Cone*, 22 Vt. 213. In that case a boy, less than four years of age, was attending school in the country, and, as he was returning home he was amusing himself by riding down hill on his sled. While engaged in this sport, as he was lying upon his breast on his sled, with his legs hanging over the sled, he was run upon and injured by the two-horse sleigh of the defendant, who was driving down hill on a smart trot. The court in its decision repudiated the doctrine of imputed negligence, and held that, although a child of tender years may be on the highway through the fault or negligence of his parents, yet, if he be injured through the negligence of the defendant, he is not precluded from obtaining his redress, all that is required of the infant plaintiff being that he exercise care and prudence commensurate with his capacity.

The rule denying the doctrine of imputed negligence is now recognized and enforced by the courts of many of the states, and is supported by the reasoning and authority of text-writers, whose opinions are justly entitled to a high degree of consideration. Among them may be mentioned Mr. Bishop, who in his recent treatise of Non-Contract Law, section 582, says: "This new doctrine of imputed negligence, whereby the minor loses his suit, not only where he is negligent himself, but where his father, grandmother or mother's maid is negligent, is as flatly in conflict with the established system of the common law as any thing possible

to be suggested. The law never took away a child's property because his father was poor or shiftless or a scoundrel, or because any body who could be made to respond to a suit for damages was a negligent custodian of it. But by the new doctrine, after a child has suffered damages, which confessedly are as much his own as an estate conferred upon him by gift, and which he is entitled to obtain out of any of the several defendants who may have contributed to them, he cannot have them if his father, grandmother or mother's maid happens to be the one making the contribution. In these and other respects, it is submitted, the established principles stated in a preceding section are conclusive of the proposition that the doctrine now in contemplation does not belong to the common law." See full discussion of the question of imputed negligence in case of injury to children in *Wharton Neg.*, § 314 et seq.; *Beach. Contrib. Neg.*, §§ 38-48. It seems to be assumed by several of the writers on the subject that this court is committed to the doctrine that in a suit by a child to recover damages caused by the negligence of the defendant the negligence of the plaintiff's parents or custodians may be imputed to the plaintiff in support of the defense of contributory negligence. While there is in some of the cases some foundation for this assumption, yet, in our opinion, the question has never been so considered or determined by this court as to make it the settled rule in this state. Most of the cases to which reference is made as supporting said doctrine were suits brought by a parent in his own right, or as the legal representative of the child, where the death of the child was alleged to have been caused by the negligence of the defendant. Such was the case in *City of Chicago v. Major*, 18 Ill. 349; *City of Chicago v. Starr*, 42 Ill. 174; *Railroad Co. v. Becker*, 76 Ill. 25; 84 Ill. 483; *Hund v. Geier*, 72 Ill. 393; *City of Chicago v. Hesing*, 83 Ill. 204, and *Railway Co. v. Grable*, 88 Ill. 441. Where an action for the negligent injury of an infant is brought by a parent, or for the parent's own benefit, it is very justly held that the contributory negligence of such parent may be shown in bar of the action. That is only a phase of the general rule that the contributory negligence of the plaintiff is a defense. *Beach Contrib. Neg.*, § 44.

Of the remaining cases to which we are referred, in which the doctrine of imputed negligence has been discussed, the first is

Railroad Co. v. Grimes, 13 Ill. 585. In that case suit was brought by an adult to recover damages of the railroad company for killing a mare, and the case of Hartfield v. Roper is incidentally referred to in the opinion as indicating an exception to a general rule which the court had laid down in its decision; but there is nothing indicating an approval or adoption of the rule there announced. In Railroad Co. v. Gregory, 58 Ill. 229, suit was brought by a child not quite five years of age, and the judgment in favor of the plaintiff was affirmed, the court holding that no negligence was shown, either on the part of the plaintiff or his mother, and there was, therefore, no occasion for determining whether her negligence, if she had been negligent, would have been imputed to the plaintiff. In City of Chester v. Porter, 47 Ill. 66, suit was brought by a child about three years old to recover damages for injuries caused by his being run over by an ox team and cart at work on the street. A judgment in favor of the plaintiff was reversed, this court holding that there was no evidence in the record of any negligence on the part of the defendant, and the fact that the plaintiff ought not to have been permitted to be on the street alone is alluded to only in the discussion of the want of evidence tending to charge the defendant with negligence. The defense of contributory negligence is not spoken of. In Railroad Co. v. Bumstead, 48 Ill. 221, a judgment in favor of the plaintiff was affirmed, the court holding, so far as the defense based upon the alleged negligence of the plaintiff's parents was concerned, that no such negligence was proved, and there was, therefore, no occasion to either assert or discuss the doctrine of imputed negligence.

In Gavin v. City of Chicago, 97 Ill. 66, the plaintiff brought suit for an injury alleged to have been caused by the negligence of the city authorities in improperly constructing or managing a swing-bridge over the Chicago river. The defendant attempted to show negligence on the part of the plaintiff's mother in permitting him to be on the street in the vicinity of said bridge, unattended. A judgment in favor of the defendant was affirmed, the court holding that there was no proof of negligence, either on the part of the plaintiff's mother, or of the city authorities. It is apparent that in none of the cases above mentioned was there any occasion for the court to determine whether, as a rule of law, the

negligence of the plaintiff's parents or custodian would sustain the defense of contributory negligence, nor is there any attempt in any of them to consider or discuss the rule. In several of them language is used which would seem to imply a tacit recognition of the doctrine of imputed negligence, but in none of them was the adoption of that doctrine essential to the decision, nor can we suppose from the language used that the court intended to commit itself definitely to an affirmance of that doctrine. The only remaining decision of this court on this question to which our attention has been called is that of *Railroad Co. v. Stratton*, 78 Ill. 88. There the plaintiff, who at the time of his injury was ten years old, was traveling on the railroad in company with, and in the immediate company of, his father. On arriving at their destination, both repaired to the platform of the car while it was yet in motion, the plaintiff taking his station on the lowest step of the platform, and his father on the next step above and behind him, both having baggage in their hands. Both stepped off while the train was still moving quite rapidly, and the plaintiff, on striking the station platform was thrown by his momentum under the cars and severely injured. This court reversed a judgment in favor of the plaintiff, not for any error of law committed at the trial, but solely on the ground that it was against the evidence. In the opinion the conclusion was reached that the evidence failed to charge the defendant with negligence, and also that it showed that the plaintiff, or at least his father, was guilty of negligence in stepping off the train while in rapid motion. Clearly, if no negligence on the part of the defendant was shown, there was no right of action, and whether the plaintiff or his father was negligent was wholly immaterial. A discussion of the doctrine of imputed negligence was unnecessary to a decision of the case. The rule, however, was stated that if the negligence of the plaintiff's father was the proximate cause of the plaintiff's injury, the defendant could, on no just principle, be held liable. This was no doubt a recognition of the rule which has been spoken of above as the English rule — that where the parent is present, and in the immediate control of the child, the parent's negligence may be imputed to the child. This court, however, cannot fairly be said to be committed to a doctrine upon the principle of *stare decisis*, by its recognition or assertion in a case which does not call for its

application, and the decision of which rests wholly upon other grounds.

Not being concluded, therefore, by any of our former decisions, we are disposed to adopt the rule which seems to us to be most reasonable and most in conformity with the recognized principles of the common law, viz., that where a child of tender years is injured by the negligence of another, the negligence of his parents or others standing *in loco parentis* cannot be imputed to him so as to support the defense of contributory negligence to his suit for damages. So far, then, as this branch of the case now under consideration is concerned, therefore, the instruction given contained no error as to which the defendant has any just ground of complaint.

But it is further objected that said instruction is erroneous in holding, as a matter of law, that the plaintiff, who at the time of his injury was only six years of age, could not be charged with personal negligence which the jury could consider as tending to sustain said defense. The application of the doctrine of contributory negligence to the conduct of young children is a difficult one, and very naturally has led to a considerable difference of opinion. The two opposing views most commonly met with are: First, that up to a certain age, the precise limit of which is not, and perhaps cannot, be well defined, a child is incapable of such conduct as will constitute contributory negligence and that the court may so declare as a matter of law. The rule thus contended for is sometimes said to be analogous to the rule of the common law which exempts children under seven years of age from criminal responsibility. It has accordingly been held that children of eighteen months, of two years, of two years and ten months, of four years, under five years, of five years, of six years, under seven years, and even seven years of age, are incapable of such negligence. Bish. Non-Cont. Law, § 586, and authorities cited. This rule seems to have been recognized in this state with more or less distinctness in the following cases: Railroad Co. v. Becker, 84 Ill. 483; Railroad Co. v. Gregory, 58 Ill. 226; City of Chicago v. Hesing, 83 Ill. 204; Gavin v. City of Chicago, 97 Ill. 66; Railway Co. v. Grable, 88 Ill. 441; Railway Co. v. Ryan, 131 Ill. 474; 23 N. E. Rep'r, 385; Railroad Co. v. Welsh, 118 Ill. 572; 9 N. E. Rep'r, 197.

The other view is that young children are bound to use such care, and such care only, as is usually exercised by children of the same age and degree of intelligence, and that it is always, therefore, a question of fact to be determined by the jury whether, in a given case, the child is in the exercise of proper care, his tender years, his intelligence or the want of it, and all the circumstances by which he was surrounded being taken into account. Under this rule, as is claimed, it can never be laid down as a matter of law that any child, however young, is incapable of contributory negligence, it being always a question of fact for the jury. The following cases are referred to as giving some support to this rule: *Railroad Co. v. Becker*, 76 Ill. 25; *Railroad Co. v. Murray*, 62 Ill. 326; *Kerr v. Forgue*, 54 Ill. 482; *Railway Co. v. Eininger*, 114 Ill. 79. But as we are disposed to view the present case, it will be unnecessary for us to determine which of these two rules should be adopted, for, even admitting that the rule last mentioned is the true one, we are of the opinion that there was no prejudicial error in said instruction. While we are not permitted to consider the evidence for the purpose of determining what is or is not proved, all questions of that character being conclusively settled by the judgment of the appellate court, we may properly consider the evidence, and all inferences which may legitimately be drawn from it, for the purpose of determining the propriety of the rulings of the court in giving or in refusing instructions to the jury. If, then, it can be seen that an instruction given, though embodying an incorrect proposition of law, could not, in view of the evidence and of all inferences which may properly be drawn from it, have materially prejudiced the party complaining of it, the judgment will not on that account be reversed. We are of the opinion that the evidence, when considered in connection with the fact that the plaintiff at the time he was injured was but six years old, does not warrant the inference that he was guilty of contributory negligence. His attention, just before he was injured, was attracted to the train of cable-cars approaching from the north; and, in obedience to his mother's directions, he waited until it had passed by, and he then attempted to cross the track in the rear of that train. He failed to notice another train coming from the opposite direction on the other track, and which at the time must have been on the other

side of the train at which he was looking, and in all probability hidden from his view. The two tracks are near together, and the instant the plaintiff passed the track on which the train was running south, he was struck by the train running in the opposite direction on the other track and injured. The only negligence charged was in not seeing, and thereby avoiding, the train running north. There is no pretense that the plaintiff saw that train, or that it was in any way brought to his attention before it struck him. If he had been an adult, and capable of the observation, reason and reflection of a man of mature years, it would probably have been his duty to know and remember that a train might possibly be in motion on the other track, and to take such precautions as were reasonably necessary to assure himself that such was not the case before attempting to cross it. But to expect such a course of reasoning and reflection of a child but six years old would be contrary to ordinary human experience. Doubtless a child as young as the plaintiff was may possess to a considerable degree what may be termed the instinct of self-preservation, and be, in consequence, capable of exercising very considerable care for his own safety. But when moved by that instinct he acts only in view of what he sees, or what is actually present to his senses.

To guard against an unseen danger, or one who has not come within the sphere of his observation, requires an exercise of reason and reflection of which so young a child is seldom capable, and for which the law, administered on humane principles, will scarcely hold him responsible. The only theory, in view of the evidence, upon which the jury could have found the plaintiff guilty of negligence in attempting to pass in the rear of the train going south was that it was his duty to observe that there was still another track to cross, and to reflect that there might be another train approaching on that track; and, being warned of possible danger by such course of reasoning, to have then looked to see whether such other track was clear before attempting to cross it. Such course of conduct may well have befitted an adult, but is scarcely to be expected of a child six years old. We are of the opinion that if, upon the evidence, the jury had found specially that the plaintiff was guilty of contributory negligence, such finding could not have been sustained. Whether the instruction,

then, was or was not correct in holding that, on account of the plaintiff's tender age, negligence could not be attributed to him, it manifestly did no harm, as the jury could not have found otherwise than they did on that question if the instruction had not been given, or if the contributory negligence of the plaintiff had been submitted to them as a question of fact. We find no material error in the record, and the judgment of the appellate court will be affirmed.*

Wilkin, J., dissents.

Accident cases — imputed negligence — infant plaintiffs.— As respects the contributory negligence of a parent or adult person in charge of a child, as affecting the right of the child to recover for injuries received, see *Well v. Dry Dock, etc., R. Co.*, 1 Am. R. R. & Corp. Rep. 374; *Newman v. Phillipsburgh Horse-Car Co.*, 2 Am. R. R. & Corp. Rep. 786; *Gulf, etc., R. Co. v. McWhirter*, 3 Am. R. R. & Corp. Rep. 158. The contributory negligence of the driver of a vehicle is not imputable to the occupants of the vehicle. *Michigan City v. Boeckling*, 1 Am. R. R. & Corp. Rep. 446; *Becke v. Missouri Pac. R. Co.*, 2 Am. R. R. & Corp. Rep. 657.

GILBERT V. HOLE.

(Supreme Court of South Dakota, June 19, 1891.)

1. **CORPORATIONS. POWER TO HOLD REAL ESTATE.** The rule is general that, where a corporation is authorized for some purposes, or to a limited extent, to take conveyance of and hold real estate, a deed of lands for other purposes, or beyond the limit allowed, is not absolutely void, but passes the title as between the parties, subject only to be inquired into in a direct proceeding by the state.

2. **HOW QUESTION MAY BE RAISED.** A corporation organized for the purpose, among others stated, of buying and selling personal property, is to that extent at least organized for a legal purpose, and may, under section 7, article 17, of the constitution, take and hold such real estate as may "be necessary and proper for its legitimate business;" and, under the rule first above announced, whether such corporation has taken the title to lands described for a purpose other than that allowed by the constitution is a matter between the government of the state and the corporation.

3. **ACQUISITION OF REAL ESTATE FOR PURPOSES NOT AUTHORIZED. EFFECT ON TITLE.** An undisputed allegation in the complaint, that the land described was purchased by such corporation for the "sole purpose of speculation and profit," does not withdraw the case from the dominion of the rule. It is a question of the power of the corporation to receive title; not a question of the conditions under which such power may be exercised, or whether in any case such conditions have been met.

* Reported in 27 N. E. Rep'r, 890.

A PPEAL from circuit court, Beadle county.

Kirke W. Wheeler for appellant. *Melville & Langley* for respondent.

KELLAM, P. J. Plaintiff's complaint states the following facts as constituting his cause of action: (1) That the Middlesex Banking Company is a corporation organized under the laws of the state of Connecticut, and that its general business is loaning money, and taking as security therefor mortgages upon real estate in South Dakota and other states and territories. (2) That the Union Investment Company is a corporation organized under the laws of the state of Minnesota, and that its general business, as set forth in its articles of incorporation, is to buy, hold, improve, lease, sell and deal in lands, tenements and hereditaments, and any property, real, personal or mixed, wherever situated; to subdivide, plat and lay out lands into towns, additions and building grounds; and that its principal place of business is the city of St. Paul, Minn. (3) That in May, 1887, the said Middlesex Banking Company loaned to one James a sum of money, and took as security therefor a mortgage upon real estate, therein particularly described, in Beadle county, then territory of Dakota, now state of South Dakota. That upon default in the payment of said mortgage the said company caused the same to be foreclosed, and to protect its interests purchased said mortgaged premises at such foreclosure sale, and through said foreclosure proceedings became the owner in fee-simple of said lands. (4) That afterward, in December, 1889, the said Middlesex Banking Company, by deed in all respects in proper form, acknowledged and delivered, attempted to convey said lands in fee-simple to said Union Investment Company, which deed was recorded in the office of the register of deeds of said Beadle county December 15, 1889; and that said Union Investment Company made said pretended purchase of said lands for the sole purpose of speculation and profit. (5) That in September, 1890, the said Union Investment Company executed in due form its deed of said lands, by which it undertook to convey the same to the defendant herein, who now unjustly and wrongfully claims to hold and own said lands under and by virtue of said pretended conveyance. (6) That in Sep-

tember, 1890, the Middlesex Banking Company, by deed in proper form, duly acknowledged and delivered, conveyed said lands to plaintiff, not having made any other conveyance of said lands, except as aforesaid to the said Union Investment Company. The relief asked was that the conveyance from the Middlesex Banking Company to the Union Investment Company, and the conveyance from the Union Investment Company to defendant, be declared void and of no effect, and that the title to said lands be quieted in plaintiff.

To such complaint defendant demurred upon the grounds: (1) That the same does not state facts sufficient to constitute a cause of action. (2) That the complaint alleges that the title of defendant is derived from the Union Investment Company, a corporation, and that under the laws of the state of South Dakota, to-wit, section 7, article 17, of the constitution of the state of South Dakota, a corporation cannot take, hold and transfer the title of lands for profit. The demurrer was sustained, and the action dismissed, and from such order and judgment plaintiff appeals.

Said section 7, article 17 of the constitution, is as follows: "No corporation shall engage in any business other than that expressly authorized in its charter, nor shall it take or hold any real estate except such as may be necessary and proper for its legitimate business."

The plaintiff derived his title directly, and the defendant his indirectly, from the same source — the Middlesex Banking Company. If that company had power to convey to plaintiff the title which he asserts and seeks to maintain as the foundation of this action, it had the power to convey to the Union Trust Company, unless the latter company was incapacitated to take the title, and for that reason the attempt to convey failed for want of a competent grantee. If the Union Investment Company was qualified to take the title, or did in fact take it, that would settle plaintiff's claim to title, for the investment company's deed was prior to delivery and recording to that of plaintiff. It is plain that, if the deed of the Middlesex Banking Company to the Union Investment Company was sufficient to divest the former of his title, its subsequent deed to plaintiff was inoperative and futile, for it then had no title to convey. The principal question discussed in the

briefs of counsel is the power and capacity of a corporation to take, hold and convey real estate for profit under the provisions of the constitution above quoted. There is, however, a question in this case preliminary to the one discussed by counsel, and that is whether, conceding that the constitutional provision quoted is intended to and does prohibit the Union Investment Company from buying and selling real estate "for the sole purpose of speculation and profit," can such prohibition be enforced, and a conveyance to such corporation be held absolutely void, in a collateral action between third parties? We think it has been pretty generally held that where a corporation is authorized for some purposes or to a limited extent to take conveyance of and hold real estate, a deed of lands for other purposes, or beyond the limit allowed, is not absolutely void, but passes the title as between the parties, subject only to be inquired into in a direct proceeding by the state.

In Dillon on Municipal Corporations (4th ed.), section 574, the rule is stated thus: "Whether a municipal corporation, with power to purchase and hold real estate for certain purposes, has acquired and is holding such property for other purposes, is a question which can only be determined in a proceeding instituted at the instance of the state. If there is capacity to purchase, the deed to the corporation divests the estate of the grantor, and there is a complete sale; and whether the corporation in purchasing exceeds its powers is a question between it and the state, and does not concern the vendor or others." See, also, to the same effect, *Cowell v. Springs Co.*, 100 U. S. 60; *Bank v. Matthews*, 98 U. S. 628; *Mining Co. v. Clerkin*, 14 Cal. 552; *Hayward v. Davidson*, 41 Ind. 214; *Barnes v. Suddard*, 117 Ill. 237; 7 N. E. Rep'r, 477; *Goundie v. Northampton, etc., Co.*, 7 Penn. St. 233; *De Camp v. Dobbins*, 29 N. J. Eq. 36. In *Cowell v. Springs Co.*, *supra*, Mr. Justice Field, speaking for the court said: "It would create great inconveniences and embarrassments if in actions by corporations to recover possession of their real property, an investigation was permitted into the necessity for such property for the purposes of the incorporation, and the title made to rest upon the proof of that necessity." This was said in an action where the corporation itself was a party; but the reasoning must apply with greater force in a case like this, where the corporation whose right

to take and convey is the proposed subject of inquiry is not before the court. A different question however, is recognized when the inquiry is as to the effect of a conveyance to a corporation whose charter, or the law under which it is organized, forbids it to take or hold real estate for any purpose. In such a case there would seem to be wanting the capacity to take title, but even then the authorities differ as to whether a deed to such corporation is void, or only voidable at the instance of the state. In *Angell and Ames on Corporations*, section 152, it is said: "There can be no doubt that if a corporation be forbidden by its charter to purchase or take lands, a deed made to it would be void, as its capacity may be determined from the instrument which gives it existence;" but in *Hickory Farm Oil Co. v. Buffalo, etc., R. Co.*, 32 Fed. Rep'r, 22, the plaintiff was a New York corporation, having taken deed to real estate in Pennsylvania. The statute of the latter state forbids a foreign corporation to "acquire and hold" real estate. In ejectment by plaintiff the court held that the deed to plaintiff was not void, but that it conveyed the title of the grantor, and that the commonwealth alone could object to the legal capacity of the plaintiff to hold the real estate. For the purposes of this case, however, it is not necessary to pursue the discussion upon this point.

The cases in which the deed to a corporation has been held void and inoperative are those in which such corporation, either by its charter or by the law, is forbidden to acquire real estate at all — cases in which it has been held there was an utter want of capacity in the corporation to receive title; but in the case before us the Union Investment Company was incorporated for the purpose among others, of buying and selling personal property. To that extent it was organized for a legal purpose, even conceding that its business of dealing in real estate for profit was illegal. It was a corporate body, some of whose purposes at least were legal and legitimate; and as such it had the power to take and hold such real estate as might "be necessary and proper for its legitimate business." In this respect the case is like *Cowell v. Springs Co.*, *supra*, and would come very clearly under control of the same rule as applied in that case, to-wit, that whether the corporation has taken the title of the lands described for a purpose other than that allowed by the constitution "is a matter between the government of the state and the corporation." True, it is alleged in the

complaint, and must be taken as admitted, that this land was purchased by the Union Investment Company for the sole purpose of speculation and profit, but that, we think, does not withdraw the case from the dominion of the rule first noticed. The rule is general that, when the corporation has capacity to take title under certain conditions, it cannot be the subject of inquiry between third parties whether in any case the requisite conditions were met, or the title made to depend upon proof as to whether in such case the corporation was acting within its power in taking or attempting to take such title. It is a question of the power of the corporation to receive the title, not a question of the conditions under which such power may be exercised. If the power exists, the state only can question the manner of its exercise. Such is very clearly the teaching of the cases cited *supra*. If these views are correct, it necessarily follows that as between the parties the deed from the Middlesex Banking Company to the Union Investment Company conveyed the title to the land in question, so that nothing remained in the former company for its subsequent deed to plaintiff to operate upon, leaving the further conclusion inevitable that in his complaint the plaintiff does not state facts which constitute a cause of action in his favor, and that the demurrer was properly sustained. The order and judgment of the court below is affirmed. All the judges concurring.*

Corporations — power to hold real estate.— See *Commonwealth v. New York, etc., R. Co.*, 1 Am. R. R. & Corp. Rep. 27, and note.

KANSAS CENT. R. CO. V. BOARD OF COUNTY COM'RS OF JACKSON COUNTY.

(Supreme Court of Kansas, April 11, 1891.)

1. EMINENT DOMAIN. LAYING OUT HIGHWAY OVER RAILROAD TRACK. COMPENSATION. Where a public highway is located and established across a railroad company's right of way, the railroad company is entitled to just compensation for all its necessary expenditures in constructing cattle-guards, and such other things as are required by the statutes to be constructed by the railroad company by reason of the highway. Johnston, J., dissenting.

* Reported in 49 N. W. Rep'r, 1.

ERROR from district court, Jackson county, Robert Crozier, judge.

A. L. Williams, Charles Monroe and R. W. Blair for plaintiff in error. Rafter & Robinson for defendant in error.

VALENTINE, J. The present case, as made in the district court and brought to this court, is a model of brevity, containing only two pages as copied by a type-writer, and yet it contains all that is necessary to present the questions sought to be presented by the parties. It appears that the Kansas Central Railroad Company, which is the plaintiff in error and was the plaintiff below, is a railroad corporation of this state; that a public county road was legally laid out and established across its right of way; that at the time this was done the railroad was operated by the Union Pacific Railway Company, another duly-organized railroad corporation of this state, as lessee; that no notice was ever given to the plaintiff with respect to any of the proceedings for the establishment or creation of this highway prior to its creation, though a proper notice was given to the Union Pacific Railway Company with respect thereto. Within twelve months after the location of this highway the plaintiff filed with the board of county commissioners of Jackson county, which is the defendant in error, and was the defendant below, its application for damages claimed to have been sustained by reason of the location and opening of the aforesaid road, which application was in due form, and for an amount exceeding \$150. The application was refused, and the plaintiff in due time appealed to the district court, where the case was tried before the court without a jury. "Upon the trial it was agreed by the parties that it would cost the plaintiff the sum of \$150 to put in, at said crossing, the cattle-guards, fences, crossing planks, crossing signs and whistle-posts, as required by the laws of Kansas to be put in by the railroad company at every highway crossing of a railroad in the state of Kansas; and that, if the plaintiff was entitled to recover damages, judgment should be for \$150. It was admitted by the parties on the trial that the plaintiff is a railway corporation, duly created and existing under the laws of the state of Kansas, and had lawfully condemned the right of way for and built and completed its railway at the place where this highway crosses its track prior to

the location of such highway; that plaintiff's railway is operated by the Union Pacific Railway Company, a corporation duly organized, which is the lessee of the Kansas Central Railroad Company. It was also proved on the trial that no notice of the meeting of the viewers to lay out said road was ever served upon the plaintiff, or any of its agents, and that no copy of such notice was on file in the office of the clerk of Jackson county.

"All the facts hereinbefore stated were agreed upon by the parties at the trial." Upon these facts the court below found generally in favor of the defendant, and against the plaintiff, and rendered judgment accordingly; and the plaintiff, as plaintiff in error, brought the case to this court for review.

We think the court below erred in its findings and judgment. A railroad company's right of way is property; an estate in land; the dominant estate securing to the railroad company the exclusive right to the occupancy, use and control of the property as against all persons except the owner of the fee; and the paramount right to such occupancy, use and control, even as against him. *Railway Co. v. Allen*, 22 Kans. 285. In all cases where a railroad company procures its right of way under the authority of the state, in the exercise of its sovereign power of eminent domain, by what are usually termed "condemnation proceedings," the railroad company pays to the owner of the land the full value of all the land actually taken, and full and complete compensation for all the losses or damages which might result to the remainder of the owner's land, and both such value and compensation are paid by the railroad company irrespective of any benefit, or supposed benefit, which might result to the owner of the land from the construction or the operation of the railroad. *Railroad Co. v. Ross*, 40 Kans. 598; 20 Pac. Rep'r, 194; *Interstate Con. R. T. Ry. Co. v. Simpson*, 26 Pac. Rep'r, 393. And the railroad company in paying this value and for these damages always pays largely more in the aggregate than the land actually taken is worth — sometimes ten or twenty times more than it is worth. And while the railroad company procures its right of way through the intervention of the state in the exercise of its sovereign power of eminent domain, and procures the same ostensibly for public purposes — and land can never be taken under such power for any other than a public purpose — yet the railroad company alone pays for such right of

way, and sometimes, as before stated, pays an amount aggregating ten or twenty times more than the land actually taken is worth. And, although the property is taken ostensibly for a public purpose, yet all the authorities agree that the railroad company, by procuring its right of way and paying for it, procures an actual, individual, private right — an easement — and an estate paramount to the rights or interests of all others except the right of the state to again subject the land to be taken under the power of eminent domain.

The railroad company in such a case is the dominant owner, and the owner of the fee is only a servient owner. It, therefore, necessarily follows that any person who should interfere with the railroad company's occupancy, use or control of its right of way, except with the authority of the railroad company, or in subserviency to its rights, or under the sovereign power of eminent domain, would be a trespasser liable to the railroad company for all damages that might result from the trespass. And it would also seem to follow that where the interference is under the sovereign power of eminent domain, and the railroad company sustains substantial loss from such interference, the railroad company would be entitled to just compensation for all such loss. Certainly, whenever the railroad company's right to the exclusive occupancy, use and control of its right of way is interfered with permanently under the power of eminent domain, something is taken from the railroad company. Of course, it is not the fee in the land that is taken, for the railroad company does not own the fee, nor is the fee under our present laws ever taken from any one under the power of eminent domain. What is taken in such a case is a portion of the railroad company's exclusive right of the occupancy, use and control of its right of way, a part of its easement, and making it a tenant in common with some other person corporation or the public. This is certainly a taking of something from the railroad company which is valuable. It is a taking of a portion of the railroad company's estate for which it has paid full and ample compensation, and for the taking of which it is entitled to compensation. Where a railroad company is compelled by condemnation proceedings to surrender the use of a portion of its right of way in part to another railroad company, all the authorities agree that something is taken from the railroad

company, and that just compensation should be awarded it. And nearly all the authorities agree that where the railroad company is compelled to surrender the use of a portion of its right of way in part to the public for a public highway, something is again taken from it for which it is also entitled to fair and just compensation. It is true that where a highway is established by proper authority across a railroad company's right of way without at all interfering with the company's use of its right of way, and without requiring the company to be at the expense of constructing crossings or cattle-guards, or erecting fences or signs or whistle-posts, or being at any other expense or suffering any substantial loss, no compensation can be allowed; but, where any real or substantial loss is suffered or damage sustained, the railroad company may have adequate compensation.

In *Mills on Eminent Domain*, section 33, the following language is used: "§ 33. The laying of a highway across a railroad track is considered an additional burden in those states where the law imposes upon the railroad company the additional expense of erecting and maintaining signs at the crossings, or erecting and maintaining cattle-guards, and of flooring the crossings and keeping the planks in repair. These expenses, being directly imposed, must be paid for. In New York and Pennsylvania the laying of highways across the tracks of railroads may be done without compensation, and the railroad company may be compelled to make the necessary excavations, embankments and bridges to safely accommodate the highway. This authority would not include the opening of roads through grounds used for necessary buildings, yards, etc., although it was suggested in Pennsylvania that a street might be opened through depot grounds, and that the wisdom of such action could not be questioned by courts." In *Lewis on Eminent Domain*, section 491, the following language is used: "In New York a statute has been held valid which authorizes the laying out of highways over the tracks of a railroad without compensation and although it compelled the railroad company to make the necessary excavations or embankments to take the highway across. This is put upon the reserved power to repeal, alter or amend the incorporation acts. The act in question only provided for crossing the 'track' of any railroad, and it was not held to apply to grounds taken for a station-house, etc., or to tracks

used simply for storing cars. Substantially the same ruling has been made in Maine, though the right to repeal, alter or amend the charter was not reserved. In other states it is held that, in such cases, the railroad company is entitled to compensation for taking its land for a highway subject to its right to use the same for railroad purposes, and to such a sum as will enable it to make and maintain the crossing, with suitable signs, cattle-guards, planking, etc. Nothing can be allowed on account of the possibility of the company being compelled to pay damages for accidents at the crossing, and evidence of what the company has paid for accidents at other crossings is incompetent. Nor can any thing be allowed for the expense of ringing a bell at the crossing, nor in view of the contingency of its having to build a bridge." In Redfield on Railroads (6th ed.), *40, No. 13, the following language is used: "A railway corporation is entitled to damages for land taken by laying a public highway across its line, and for the expense of maintaining signs and cattle-guards at the crossing, and of flooring the same and keeping it in repair; but not for any increased liability to accidents, for increased expense of ringing the bell, or its liability to be ordered by the county commissioners to build a bridge for the highway over the track. And in assessing damages, in such a case, no supposed benefits from an increase of travel on the railway can be set off against the company." In Pierce on Railroads, 193, the following language is used: "The laying out of a highway across land of a railroad company which is used for a station, or for other purposes than a right of way, is a taking of its property entitling it to compensation. So, also, it is entitled to compensation where the highway appropriates lengthwise a part of its right of way. The laying out of a highway across the company's track, without further interference with it, is, however, not a taking of its property. The state, in authorizing the crossing, simply regulates and adjusts private rights with reference to public interests and exercises its reserved police power. The crossing should be laid in a manner to cause as little injury as possible to the previous use, and the railroad company is entitled to compensation where the crossing is so constructed as to result in serious inconvenience."

In 6 American and English Encyclopædia of Law, 554, 555, the following language is used: "When a highway is laid out

by the proper authority across a railroad company's right of way, this is not such a taking of property as entitles the company to damages; but where the company is required to erect sign-posts and maintain the crossing, there is in such case a taking for which compensation must be made. Where a railroad company constructs its track across a turnpike, compensation must be made to the turnpike company. The owner of property which abuts upon a highway cannot recover damages for the mere crossing of the highway by the tracks of the railroad; but, if his property is injured by change of grade made for the purpose of laying said track, he can recover. Where one railroad company is authorized to run its tracks over the land of another, this is a taking for which compensation must be made." Also, as in favor of the doctrine that railroad companies may recover compensation in such cases, see the following cases: *Railroad Co. v. Plymouth Co.*, 14 Gray, 155; *Crossley v. O'Brien*, 24 Ind. 325; *Railroad Co. v. City of Detroit*, 49 Mich. 47; 12 N. W. Rep'r, 904; *Grand Rapids v. Grand Rapids & I. R. Co.*, 58 Mich. 641; 26 N. W. Rep'r, 159; *Railway Co. v. Hough*, 61 Mich. 507; 28 N. W. Rep'r, 532; *Railroad Co. v. Deering*, 78 Me. 61; 2 Atl. Rep'r, 670; *Kansas City v. Kansas City Belt R. Co.* (decided by the supreme court of Missouri, December 1, 1890), 14 S. W. Rep'r, 808. The following cases possibly hold a different view: *Railway Co. v. Sharpe*, 38 Ohio St. 150; *Railroad Co. v. President*, 5 Lans. 461. In the case of *Railway Co. v. Hough*, supra, it was decided as follows: "Where a highway is laid out across a railroad, the railroad company is entitled to include in its damages to be paid by the township the expense of cattle-guards, fencing and other outlays to complete the approaches, besides the cost of maintaining them; and a statute which imposes this expense upon the railroad company is in conflict with the constitutional provision forbidding the taking of private property without just compensation."

The principal objections urged against the right of the railroad company to receive compensation for its losses, in cases where a public highway is laid out across its track, are the following: First, It is claimed that the railroad company obtains its right of way through the intervention of the state, and by the exercise of the state's sovereign power of eminent domain, and, therefore, it

must be presumed that the state reserves to itself the right, or, in other words, creates the rights, to take a portion of such right of way at any time afterward for any other public purpose, without any compensation to the railroad company. Second. It is also claimed that no substantial damages are suffered by the railroad company except by its expenditures in the construction of cattle-guards, fences, signs, etc.; and that the duty of constructing these things is imposed upon the railroad company under the police power of the state, and, therefore, that the railroad company cannot receive any compensation for their construction.

It is true the railroad company obtains its right of way under the authority of the state, and by virtue of the exercise of the sovereign power of eminent domain; but the railroad company pays for all the property which it procures, and the state pays nothing. Indeed, as a general rule, the railroad company pays vastly more than all the property which it actually receives is worth, pay not only the actual value of the land taken, but also all the damages supposed to result to that not taken; and all this without deducting any thing for benefits received; and no one else pays any thing. Of course, the state continues to hold the power to take the property again for some other public purpose, as for a right of way for another railroad company or for a public highway; for this power, that is, the power of eminent domain, is inherent in the state, inalienable, permanently existing, inexhaustible, and extends to all property, and the state could not deprive itself of such power by any thing it might do. But there is nothing in law or in reason that would even intimate that the state would desire to retake the property for another public purpose without fair compensation to the railroad company, even if it could do so. When the state takes a portion of a railroad company's right of way for the right of way for another railroad company or for a highway, it takes it just as it takes any other private property, and the railroad company which suffers the loss should receive just compensation.

Whether the duty imposed upon the railroad company of constructing cattle-guards, fences, signs, etc, can be or is imposed upon it under the police power of the state, makes no difference in this case. If the highway should not be established across the railroad company's right of way, then it would not be necessary

for any of these things to exist; but, if a highway is so established, then the duty under the statutes immediately springs into existence, requiring the railroad to so construct these things. The establishment of the highway is, therefore, the cause of all these additional burdens being imposed upon the railroad company. And must the railroad company bear these burdens and suffer these losses without compensation? Why should it be treated differently from others who have interests in real estate? All others having interests in real estate are entitled to compensation for losses resulting from the location of a public highway interfering with their free and rightful use of such interests. *Commissioners v. Labore*, 37 Kans. 460, 484, et seq. And why should not a railroad company be entitled to compensation for losses in like cases?

With reference to all the public highways existing at the time when the right of way for any railroad is procured, and which might affect the location of the railroad, the railroad company has notice, and, therefore, has notice with reference to what cattle-guards, etc., it must construct when it constructs its railroad; and it constructs its railroad with the understanding that it must make all the necessary expenditures for the construction of such cattle-guards, etc. But with respect to highways not already established when the right of way is procured, there can be no such understanding. We think a railroad company may recover, in a case like the present, for all expenditures it is required to make under the statutes by reason of the location of a highway across its right of way. With regard to notice, the notice to the Union Pacific Railway Company was no notice to the plaintiff. The judgment of the court below will be reversed, and cause remanded for further proceedings.*

Horton, C. J., concurs. Johnston, J., dissents.

Laying out highway over railroad track — compensation. This question is considered in note to the following case. See also *Am. Rapid Tel. Co. v. Hess*, ante, p. 190, and note. The case reported was approved and followed in *Board of Comrs. of Greenwood Co. v. Kansas City, etc., R. Co.* (Kans.), 26 Pac. Rep'r, 397.

* Reported in 26 Pac. Rep'r, 394; 45 Kans. 716.

CHICAGO & N. W. R. Co. v. CITY OF CHICAGO.

(Supreme Court of Illinois, January 18, 1898.)

1. **EMINENT DOMAIN. EXTENDING STREET ACROSS RAILROAD RIGHT OF WAY. COMPENSATION.** A statute of Illinois provides as follows: "Hereafter at all of the railroad crossings of highways and streets in this state the several railroad corporations in this state shall construct and maintain said crossings, and the approaches thereto, within their respective rights of way, so that at all times they shall be safe as to persons and property." 2 Starr & C. Stat. 1037. In a proceeding to lay out a street across the right of way of the appellant company, it was held, (1) that the statute applied as well to crossings established after the passage of the act as to crossings existing before; (2) that the statute was a valid exercise of police power, and binding upon appellant; (3) that the appellant was not entitled to any compensation on account of the expense of constructing and maintaining the crossing.

2. **DAMAGE TO BUSINESS.** In such a proceeding nothing can be allowed for damage to the business of the company, or increased trouble or expense in operating its trains caused by delay at the crossing, danger of accidents and the like, as the company takes its franchise subject to the right of the state to establish intersecting highways as the public good may require.

3. **NOMINAL DAMAGES.** There being no evidence of actual damage, upon which a calculation could be predicated, it was proper to render judgment for the nominal sum of \$1.

A PPEAL from the circuit court of Cook county, Francis Adams, judge.

W. C. Goudy for appellants. *John S. Miller*, corporation counsel, for appellee.

MAGRUDER, C. J. This is an appeal from the judgment of the circuit court of Cook county, fixing the compensation for property taken and damaged by the city of Chicago for the extension of West Taylor street across the right of way of the Chicago and North-Western Railway Company and the Chicago, St. Louis and Pittsburgh Railroad Company in that city. The circuit court found that the just compensation to be paid to the city for the extension of the street across the tracks and right of way of the railroad companies was \$1, and awarded that amount in its judgment. The street is sixty-six feet wide, and the right of way of the two companies is one hundred feet wide.

Both companies were made defendants to the original petition for condemnation filed by the city, and entered their appearance. They filed a joint cross-petition alleging that, in addition to the

land to be taken for the opening of the street, they were the owners of land on each side thereof used by them as a right of way for their tracks, and which would be damaged by the taking of the strip described in the petition for a street. The petition prays that the damage to their business, and to their lands not proposed to be taken, and all damages caused by the opening of the street, and taking of the land therefor, be assessed.

The cause was tried by agreement before the court without a jury. The appeal is taken by the Chicago and North-Western Railway Company alone. The elements of damage set up in the cross-petition are, that the taking of the land and the opening of the street will interrupt the business of the cross-petitioners, and necessitate the construction by them of approaches to the crossings, the planking of their tracks, the draining of the side-crossings and the adjoining land owned by them, the erection of gates at said crossings, and the keeping of a flagman there.

It was admitted that the fee of the land described in the petition was in the railroad companies; that the Galena and Chicago Union Railroad Company was incorporated in 1836; that in 1864 that road was consolidated with the Chicago and North-Western Railway Company, under the latter name, and that "the road at the proposed crossing had been constructed by the Galena and Chicago Union Railroad Company."

The city proved that so much of the railroad right of way, being a strip one hundred feet long, and sixty-six feet wide, as it was proposed to use for a street, had no market value for the use of a street subject to the rights of the railroad companies, and was not worth more than \$1.

The companies proved that the effect of opening the street would be to compel them to incur the following items of expense: for grading, \$50; planking, \$460; gate, \$375; power-house, \$190; total, \$1075; and in order to maintain the crossing, the following items of expense: salary of gate-tender, night and day, \$960 per annum; repairs per annum to planking, \$76.66; repairs per annum to gate, \$25; making a total expense each year of \$1,061.66. The proof of the defendants also showed that there were four or five tracks laid upon the right of way at the point where the street was to cross such right of way, and that about fifty trains passed that point daily.

The city did not propose to condemn the land of the railroad companies, nor to prevent the use of the tracks and right of way by such companies. It merely proposed to extend a street across such tracks and right of way. The value of the land where the street was to cross could not, therefore, be the measure of just compensation for property taken in the condemnation proceeding; nor could the value of the use of the property for railroad purposes be the measure of such compensation. So far as the taking of the strip was concerned, the measure of the compensation would be the amount of decrease in the value of the use for railroad purposes, which should be caused by the use for the purposes of a street, such use for the purposes of a street being subject to the use of the companies for railroad purposes. We cannot discover that there was any testimony to justify any more than a judgment for nominal damages so far as the taking of property is concerned. Hence the case turns altogether upon the alleged damages to the property not taken, as set up in the cross-petition.

The question is, whether, in a case where a city institutes a condemnation proceeding to open or extend a street across a railroad already constructed, the company owning such railroad is entitled to be allowed, as a part of its just compensation, the amount of its expenses in constructing and maintaining the street crossing.

Section 8 of "An act in relation to fencing and operating railroads," approved March 31, 1874, in force July 1, 1874 (2 Starr. & C. Ann. Stat. 1927), is as follows: "Hereafter, at all of the railroad crossings of highways and streets in this state the several railroad corporations in this state shall construct and maintain said crossings and the approaches thereto, with their respective rights of way, so that at all times they shall be safe as to persons and property."

It does not appear in this record what the provisions of appellant's charter are, or what were the terms of the ordinance of the city of Chicago under which its predecessor laid its tracks within the limits of that city. It does not appear that such charter did not require it to construct and maintain the crossings of all highways and streets that might be extended across its right of way in the future, or that such ordinance did not impose said requirement as to streets thereafter to be opened in the city. It does

appear, however, that its charter was granted and that its road was built, at the point, where it is proposed to extend West Taylor street across its right of way, before the act of 1874 was passed, and also before the act of 1872 for the incorporation of cities and villages was passed. 1 Starr & C. Stat. 465 and 472. But the power of the city to extend the street across the right of way is not denied; and the cross-petition admits that such extension, when it takes place, will necessitate the construction and maintenance of the street crossing by the railroad company. The company does not refuse to construct and maintain the crossing, nor deny the power of the legislature or city council to require it to do so. It proposes to construct and maintain the crossing, and if it does so, it can make no practical difference whether it does so, because the law so requires, or for some other reason. Hence the case of I. O. R. Co. v. City of Bloomington, 76 Ill. 447, has no application to the present controversy. In that case, the city, by ordinance passed in pursuance of the power conferred by its charter, required the railroad company to make a proper and safe crossing by grading the approaches of the street at the crossing; the company refused to do so; thereupon the city did the grading and made the crossing, and sued the company for the amount expended for such purpose. It was held that the company was not liable, but it was expressly stated that the question whether the right of way was so far public property that it need not be again condemned where a highway or street crosses it, was not presented by the record, and that the question was not presented whether the city, having made the improvement, the company might be required, as a police regulation, to keep it repaired.

If, under the authority of the Bloomington case, appellant is not bound to make the crossing, then why does it ask to be allowed damages in this proceeding for the probable expense of making it? The fact that it asks compensation for such damages is a concession of its intention to make and maintain the crossing, and the presumption is that such intention will be carried into effect because of the requirements of the law upon that subject.

The only question is, whether the appellant is bound to construct and maintain the crossing without compensation, or whether it should have been awarded damages for the expense of such construction and maintenance by the judgment of the court below.

The government owes to its citizens the duty of providing and preserving safe and convenient highways. From this duty results the right of public control over highways. Railroads are public highways, and in their relations as such to the public are subject to legislative supervision, though the interests of their shareholders are private property. Every railroad company takes its right of way subject to the right of the public to extend the public highways and streets across such right of way. *Railway Co. v. Railway Co.*, 30 Ohio St. 604. In the separate opinion in *C. & A. R. Co. v. J., L. & A. Ry. Co.*, 105 Ill. 388, it was said :

"Unless, therefore, every railroad corporation takes its right of way subject to the right of the public to have other roads, both common highways and railways constructed across its track whenever the public exigency might be thought to demand it, the grant of the privilege to construct a railroad across or through the state would be an obstacle in the way of its future prosperity, of no inconsiderable magnitude."

If railroads, so far as they are public highways, are like other highways, subject to legislative supervision, then railroad companies in their relations to highways and streets which intersect their rights of way, are subject to the control of the police power of the state, that power of which this court has said, that "it may be assumed that it is a power co-extensive with self-protection and is not inaptly termed the law of overruling necessity." *Lake View v. Rosehill Cemetery Co.*, 70 Ill. 191.

The requirement embodied in section 8, that railroad companies shall construct and maintain the highway and street crossings and the approaches thereto, within their respective rights of way, is nothing more than a police regulation. It is proper that the portion of the street or highway which is within the limits of the railroad right of way should be constructed by the railroad company and maintained by it, because of the dangers attending the operation of its road. It should control the making and repairing of the crossing for the protection of those passing along the street and of those riding on the cars. Section 8 recites that the railroad companies shall construct and maintain the crossings, "so that at all times they shall be safe as to persons and property." Safety of persons and property is the object of the requirement. The grading of the approaches and the planking between the rails

and tracks made it possible for men and trains to cross easily and quickly and thus avoid collision with passing trains, thereby insuring their own safety and the safety of the persons and property upon the trains. The Supreme Court of the United States have said: "Whatever differences of opinion may exist as to the extent and boundaries of the police power * * * there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens." *Fertilizing Co. v. Hyde Park*, 97 U. S. 659. The testimony of the appellant in this case shows that the planking and the gates and the power-house which is used to operate the gates, are necessary for the safety of the public and to prevent accidents. The gates, no less than the grading and planking, are necessary to maintain the crossings and the approaches thereto, "so that at all times they shall be safe as to persons and property."

The items of expense, for which appellant claims compensation, are such only as are involved in its compliance with a police regulation of the statute. It is well settled that "neither a natural person nor a corporation can claim damages on account of being compelled to render obedience to a police regulation designed to secure the common welfare." *C. & A. R. Co. v. J., L. & A. R. Co.*, 105 Ill. 388.

It has been held by this court in a number of cases, that railroad corporations may be required to fence their tracks, to put in cattle-guards, to place upon their engines a bell, and to do other things for the protection of life and property, although their charters contained no such requirements. *G. & C. U. R. Co. v. Loomis*, 13 Ill. 548; *G. & C. U. R. Co. v. Dill*, 22 Ill. 264; *O. & M. R. Co. v. McClelland*, 25 Ill. 140; *P. & P. U. Ry. Co. v. P. & F. Ry. Co.*, 105 Ill. 110; *C. & A. R. Co. v. J., L. & A. Ry. Co.*, 105 Ill. 388.

In *O. & M. R. Co. v. McClelland*, supra, the question was presented whether the legislature could require railroad companies whose roads were already constructed and in operation, to fence their tracks, although there was no such requirement imposed by the charter; and it was there held that it was a police regulation and within legislative power.

In *I. C. R. Co. v. Willenborg*, 117 Ill. 203, the question arose whether a railroad company could be required to construct

a farm crossing over its road years after the road had been built, under the provisions of the act of 1874 above referred to, and we there said: "The point is made, however, that these provisions are not obligatory on this corporation because they were enacted many years since it received its charter from the state. This is a misapprehension of the law. The regulations in regard to fencing railroad tracks and the construction of farm crossings for the use of adjoining land-owners are police regulations in the strict sense of those terms, and apply with equal force to corporations whose tracks are already built as well as to those to be thereafter constructed. They have reference to the public security both as to persons and to property. * * * No reason is perceived why, upon the same principle on which a railroad corporation may be required to fence its track and construct cattle-guards, it may not be required also to construct farm crossings." No reason is perceived why what is said in the Willenborg case as to a farm crossing, does not also apply here to a street crossing, required to be constructed by a railroad company years after the construction of its road.

The language of section 8 is broad enough to include streets to be thereafter opened or extended, as well as existing streets. If the design of that section was to limit the obligation of the railroad company to existing crossings only, the word "construct" would not have been used. That word involves the idea of building or making for the first time, or of bringing into existence for the first time. A crossing already existing may be maintained, but it is an inaccuracy to speak of constructing that which has already been constructed. There is no reason for supposing that the legislature intended to refer exclusively to a railroad crossing, created by running a new railroad across an existing street. The language includes also a railroad crossing, created by running a new street across an existing railroad. This view is justified by the history of the legislation upon the subject.

Section 8, as it appears in the act of 1869 (Pub. Laws of 1869, p. 312; Gross Stat. of 1871, p. 558), reads as follows: "At all the railroad crossings of the public highways of this state, outside the corporate limits of the cities and villages, the several railroad companies of this state shall erect, construct and maintain the same, and the approaches thereto, within their respective

rights of way, so that all times they shall be safe as to lives of persons and property." This confined the obligation to construct and maintain to crossings outside of the limits of cities and villages. Presumably the crossings inside the limits of cities and villages were to be constructed and maintained by the municipal authorities.

The City and Village Act of 1872 (Rev. Stat., chap. 24, art. 5, § 1, pars. 26 and 27; 1 Starr & C. Stat., 465) conferred upon cities and villages the power to require railroad companies "to construct * * * crossings of streets and public roads and keep the same in repair, within the limits of the corporation."

Although the power was thus conferred upon cities and villages, such power might not be exercised by the passage of appropriate ordinances.

Then came the act of 1874 containing section 8 as it now exists. In this act the legislature evidently intended to go further than it had ever gone before. Thereafter the railroad companies were required to construct and maintain the railroad crossings of streets as well as public roads, of highways within, as well as without, the limits of cities and villages; and their obligation so to do was enjoined by the mandate of a public law, and not left to the exercise of the power previously conferred upon city and village authorities. Thereafter, the cities and villages were only bound to construct the crossings and approaches thereto after failure of the railroad companies to do so upon notice given. Section 8 does not require the railroad companies to reconstruct the crossings already made by the municipal authorities; it was sufficient to maintain them; but it most clearly requires each of them to construct any railroad crossing which may thereafter be made necessary by the building of its own road, or by the opening of a new street.

It is to be noted, that by section 11 of the act of 1874, if the railroad company fails to construct and maintain the street crossings and their approaches, after being notified so to do, not only shall it be liable for the expenses of the municipal authorities in that behalf, but it shall be subject to a fine. It is also to be noted that sections 8, 9, 10 and 11, in regard to the construction and maintenance of street crossings and their approaches, appear in the act of 1874, which is an act in relation to fencing and "operat-

ing railroads;" and also that those sections are among provisions of the act requiring the "fencing of railroads, the erection of farm-guards, cattle-guards, gates or bars at farm crossings, warning boards at highway crossings, the ringing of bells and sounding of whistles," etc., all of which latter requirements have been held to be regulations enjoined by the legislature in the exercise of its police power. The act of 1869 above referred to, was entitled "An act to protect lives and property of persons at railway crossings of the public highways." If the construction and maintenance of these crossings and their approaches constitute a part of the method of operating railroads and are required for the protection of lives and property, it is difficult to understand how the provisions in regard to them can be regarded otherwise than as mere police regulations.

We do not agree with counsel for appellee that section 8 necessarily operates as a repeal of paragraph 89 of section 1 of article 5 of the City and Village Act, 1 Starr & C. 472. That paragraph is as follows:

"The city council shall have power by condemnation or otherwise, to extend any street, alley or highway over or across, or to construct any sewer under or through any railroad track, right of way, or land of any railroad company (within the corporate limits); but where no compensation is made to such railroad company the city shall restore such railroad track, right of way or land to its former state, or in a sufficient manner not to have impaired its usefulness."

This paragraph confers the power on the city council to extend the street across the railroad right of way. As we have recently held in *Ill. Cent. R. Co. v. City of Chicago*, 28 N. E. Rep'r, 740, it authorizes the city, by condemnation, to obtain the use of a part of the railroad right of way "subject to the rightful use of the railroad company thereof." A provision which requires the railroad company to construct and maintain the crossing, does not conflict with a provision which authorizes the city to use such crossing and specifies how such use may be obtained. Paragraph 89 implies that there may be cases where the railroad company is entitled to compensation and cases where it is entitled to no compensation. In the extension of streets over other railroad lands than tracks or rights of way, and in the construction of sewers under or through the railroad rights of way, serious damage might

be done, which would require compensation or restoration. But where the approaches to the crossing are graded and planks are laid between the rails to make an even surface for the passage of persons and teams, and gates are erected to delay such passage until trains pass, there is no part of the track or right of way, or land, to be restored to its former state; nor is the usefulness of the railroad in any way impaired.

These items of expense are set up in the cross-petition as damages to the property not taken, that is, to the right of way on either side of that portion of the right of way which is to be used as a street. How can grading the approaches, planking the crossing and erecting gates damage the right of way adjoining the street crossing? The expense which they necessitate may require a deduction from the revenues of the company, but there is no proof to show that there is any such injury or inconvenience as reduces the capacity of the corporation to transact its business. Not the grading, or planking, or gates, but the use of the crossing by the public may result in the stoppage, or slower movement of trains, and in the increased danger of accidents, but we have held that no damages can be allowed for these inconveniences. *P. & P. U. Ry. Co. v. P. & F. Ry. Co.*, supra; *C. & A. R. Co. v. J., L. & A. Ry. Co.*, supra.

Uncompensated obedience to a regulation enacted for the public safety, under the police power of the state, is not a taking or damaging without just compensation of private property, or of private property affected with a public interest. *R. Co. v. Co. Commissioners*, 79 Me. 386.

There is a conflict among the decisions of the states upon this subject. The views here expressed are contrary to those which have been held in Michigan, Kansas and Minnesota, and, perhaps, some other states; but they accord with the decisions in Maine, New York, Ohio and Vermont.

In *P. & R. R. Co. v. Deering*, 78 Me. 61, a town laid out a way over the track of a railroad company, and the question was as to the damages for the easement taken. A statute of the state required railroad corporations to build and maintain highway crossings laid out over their tracks. It was held that although the statute was passed after the charter of the company was granted, yet it was proper to apply its provisions to highways not

in existence when the railroad was built, and an instruction which told the jury "not to allow to the company in the assessment of damages, any of the expense which will be incurred by them in building and maintaining so much of the new ways as are within the limits of their own location" was held to be correct.

In the later case of *R. Co. v. Co. Commissioners*, 79 Me. 386, decided in 1887, there was an appeal from an award of land damages for the location of a county way across a railroad; and it was held that the lower court decided correctly in refusing to give the following instruction: "The appellant is entitled to recover damages for taking his land for the purposes of a highway, subject, however, to its use for a railroad; for the expense of erecting and maintaining signs required by law at the crossing; for making and maintaining cattle-guards at the crossing, if necessary, and for the expense of flooring the crossing and keeping the planks in repair." The court there criticized the previous decision of *State v. Noyes*, 47 Me. 189, decided in 1859, as too narrow and strict in its interpretation; indorsed their decision in the *Deering* case, and held that the statute, which required the railroad company at its own expense to build and maintain so much of the county road as was within the limits of the railroad, was valid as an exercise of the police power of the state, and that the duty imposed thereby upon the company did not entitle it to any extra compensation for the taking of its land, and that its expense therefor was not to be considered in appraising the damages. After an elaborate discussion of the question involved the court says:

"From the above instances of the application of the police power, the Maine statute, requiring the railroad company to care for and maintain highway crossings within its location, seems to be a moderate and ordinary exercise of a constitutional power."

In New York, it has been held that a statute, authorizing the construction of highways across railroad tracks without compensation, does not violate the constitutional provision against taking private property for public use, or impair the obligation of contracts. *Albany Northern R. Co. v. Brownell*, 24 N. Y. 345; *Boston & Albany R. Co. v. President, etc., of Village of Greenbush*, 5 Lans. 461. To the same effect are *Railway Co. v. Sharpe*, 38 Ohio St. 150; *Railway v. Railway*, 30 Ohio St. 604, and *Thorpe v. R. & B. R. Co.*, 27 Vt. 140.

We cannot concur in those decisions in Michigan and Kansas, which hold that, where a highway is laid out over a railroad, the company is entitled to include in its damages the expense of cattle-guards, fencing, etc.

In *T., P. & W. R. W. Co. v. Deacon*, 63 Ill. 91, we said: "The state has reserved to itself the power to enact all police laws necessary and proper to secure and protect the life and property of the citizen. Prominent among the rights reserved and which must inhere in the state, is the power to regulate the approaches to and the crossing of public highways, and passage through cities and villages, where life and property are constantly in imminent danger by the rapid and fearful speed of railway trains. The exercise of their franchises by corporations must yield to the public exigencies and the safety of the community."

There was no error in rendering judgment for a nominal sum, as this may be done where the evidence shows damage, but furnishes no basis for ascertaining the amount. *P. & P. U. Ry. Co. v. P. & F. Ry. Co.*, supra.

The judgment of the circuit court is affirmed.

Affirmed.*

Eminent domain — laying out highway over railroad right of way — measure of damages. — The foregoing cases, from Kansas and Illinois, are the latest exponents of two diverging lines of decisions upon the measure or rules of compensation, required by the constitution, when a highway is laid out across a railroad right of way. *People v. Detroit*, etc., R. Co., 2 Am. R. R. & Corp. Rep. 215; S. C., 79 Mich. 471, and *State v. Chicago*, etc., R. Co. (Neb.), 2 Am. R. R. & Corp. Rep. 664, are also recent decisions upon the subject and the older decisions are collected in the notes to those cases.

The late case of *New York*, etc., R. Co. v. *City of Waterbury*, 23 Atl. Rep'r, 439; 60 Conn. 1, supports the doctrine of the Illinois case. A statute of Connecticut provided that "whenever a new highway or a new portion of a highway should thereafter be constructed across a railroad, such highway or portion of highway shall pass over or under the railroad, as the railroad commissioners shall direct. The company or trustee operating such railroad shall construct such crossing to the approval of the railroad commissioners, and may take land for the purposes of this section, in the manner now provided by law for the taking of land by railroad companies. One-half the expense of such crossing shall be borne by the company or trustee constructing the same, and the other half thereof shall be paid to said company or trustee by the town, city or borough which constructs said highway or portion of highway." Gen. Stat., § 3481.

In a proceeding to lay out a highway over the railroad in question, the com-

* Reported in 24 Chicago Legal News, 186; 20 N. E. Rep'r, 1109.

pany claimed that it was entitled to recover, as compensation, the one-half the expense of constructing the crossing, which it was required to pay by the statute. The court ruled otherwise, and in its opinion says: "The question before us is an interesting one, and not entirely free from difficulties. The statute requires the applicant to construct a bridge over the highway which is laid out across its track. Now, because it owned the land taken for the highway crossing in fee, and it was, therefore, taken under the exercise of the right of eminent domain, can the applicant demand, by way of just compensation, that the one-half of the expense, which the law requires him to pay, shall be paid back to him by the respondent? We think not. Compensation for expense arising through such statutory obligation is not a legal element of damage. There is no right to compensation for what the law says shall be done at the expense of the railroad company. It is not a taking of property to compel it to pay one-half the expense of building a bridge to protect the public, nor damage incident to the taking of property within the true meaning of the words. We cannot hold that a duty which the state has most justly imposed upon the applicant as its share toward the protection of life should be turned into an element of damage, for which compensation must be made when circumstances arise which create the duty. We are well aware that there are decisions that, where highways cross a railroad, the expense of cattle-guards, signs and planking is an element of damage which must be paid for. Different states have decided differently upon this point. *Mills Em. Dom.*, § 88. Perhaps it is impossible to discriminate between those cases where compensation has been awarded and the case at bar. But the precise question here involved is substantially novel, and, at the risk of antagonizing the rule, if it exists, of allowing compensation for the expense of erecting statutory safeguards, we must decide this case upon the principles we have stated."

The question received elaborate consideration in the case of *State, ex rel., v. District Court of Hennepin Co.*, 42 Minn. 247. The railroad company claimed as compensation a sum of money which would enable them to construct and maintain the planking, cattle-guards and signs at the crossing. The claim was disallowed as to the cattle-guards and signs, but the court held that compensation should be allowed for the expense of laying and maintaining the planking. The court says:

"For the present we will confine our attention to the cattle-guards and sign-board. The necessity for these arises from the dangerous nature of the use of the railroad property; and it cannot now be questioned that as a matter of mere police regulation, the state has the power to impose upon railroad companies the duty of maintaining these safeguards. There can be no doubt that if no such requirement had ever been embraced in our general laws or in the charters of railroad corporations, and if all our railroads had been constructed without such devices for lessening the dangers incident to railroad operations, it would be within the police power of the legislature to require all railroad companies to provide such safeguards at all existing railway crossings. It has been decided in this court that the police power of the state authorized such requirements as to the construction of cattle-guards and fences. *Gillam v. Sioux City & St. Paul R. Co.*, 26 Minn. 268; 8 N. W. Rep'r, 858; *Winona & St. Peter R. Co. v. Waldron*, 11 Minn. 392, 515. It is but an exercise of the every-

where recognized police power of the state, regulating by reasonable and necessary means the use of instrumentalities otherwise attended with obvious and great danger to the public. No other principle is involved in such requirements than is involved in imposing a reasonable limitation upon the speed of railway trains at street crossings, and within the limits of thickly-populated municipal districts, or in requiring a bell to be rung or whistle blown at highway crossings, or the stoppage of trains at railway crossings, and in other like provisions which are found in the statutes of every state. Such statutory regulation of the use of property does not constitute a taking of the property or its destruction. It is only the exercise of the power of the state to reasonably control the use of property and the conduct of the individual, so far as may be necessary for the public safety; and to such control every citizen and owner of property must submit without compensation.

"If the legislature, then, could constitutionally, and without providing for compensation, have imposed this duty in the case supposed, after the railroad had been constructed and put in operation, by enacting a law requiring railroad companies to construct cattle-guards across their right of way, and to erect sign-boards to notify travelers of the existence of the railroad crossing, it will be found difficult to assign a reason in support of the relator's claim for a compensation in this case. Although this street was not in existence when the railroad was constructed, and hence the requirement of the general law did not impose the duty of putting in cattle-guards and sign-boards at this place at that time, yet as soon as the street was laid out and opened, the already existing law became applicable and required these things to be done. But this was an exercise of the police power, as in the case before supposed. The circumstances with reference to which the general police regulation, embodied in the general law, had been framed, have now come to exist in respect to this particular locality, and the requirements of that law have become operative. There was no implied contract between the state and this corporation, when it became incorporated, that it should only be required to put in and maintain these safeguards at the crossings of streets then laid out, or at such as might be laid out prior to the construction of the railroad. The fact that not until after the construction of the railroad has the situation at this place come to be such as to require any protection from the dangers incident to railroad operation has very little bearing upon the case, if, as we think is self-evident, the statutory requirement to which the corporation is subjected is merely a reasonable police regulation of its business, and not a taking and destruction of its property. When the railroad company accepted its charter, it received its franchises subject to the authority and power of the state, to impose such reasonable regulations concerning the use, in matters affecting the common safety, of its dangerous enginery, and not merely subject to the then existing regulations as applicable to then existing conditions; and whether the obligation now in question had been imposed at this time by direct act of the legislature, or as in the case arises from the laying out of a new highway, to which the previously-existing law becomes applicable, can make no difference.

"The fallacy involved in the claim of the relator, and as we think, in some decisions by which its claim is supported, arises from a failure to distinguish between rights of property which confessedly are protected under the consti-

tution from being divested or appropriated to other purposes without compensation, and the very different matter concerning the manner in which the owner may use his property so as not to unnecessarily endanger the public. The claim of the relator involves an assumption that when the railroad constructed its line of road, conforming to the requirements of the law as to all then existing highway crossings, it had a constitutional right, by virtue of its priority, to always afterward operate its road unembarrassed by being required to observe like precautions with respect to highways that might be thereafter laid out across the railroad, except upon the condition that it should receive compensation, not merely for whatever of its acquired property might be taken for the other use, but also for the expense and burden of conforming its own conduct to the newly-existing conditions, of conforming to a general police regulation of the state, not before applicable. There was no such exclusive or superior right acquired by priority of charter, or of the construction of this railroad highway. It cannot be supposed that when its franchises were granted to this relator to construct and operate this railroad, it was contemplated, either by it or by the state, that no more public highways should be laid out which should increase the number of places where the ordinary police regulations would have to be complied with by the railroad company to its inconvenience and expense. On the contrary, it must have been understood and contemplated, especially in a new state rapidly advancing in population and in the development of its resources where new towns are springing up, and new avenues for travel and traffic were becoming necessary, that new streets and roads would be and must be laid out, and that many of these would necessarily cross existing railroad lines. We cannot resist the conclusion that, so far as concerns the matter now under consideration, the charter of the relator was taken subject to the right of the state to impose this duty whenever, by reason of the establishing of new highways, it should become necessary; and hence the relator is not entitled to compensation for obedience to this requirement.

* * * * *

"As to the planking between the rails, where the street crosses the railroad, it seems to us that a distinction exists which should affect the conclusion. The planking has little, if any thing, to do with operation or safety of railway trains. The railway having been properly and lawfully constructed, the planking becomes a proper, and perhaps reasonably necessary, incident of the construction of the highway across the existing railroad. Independent of statutory regulation of the subject, it would have been the appropriate duty of the public authorities opening such a highway to make this necessary provision for the convenience of travelers on the highway, thus overcoming an obstruction to travel which lawfully existed upon the relator's property, and which could not be removed. This might be deemed a part of the work of constructing the highway, and making it fit for travel. But while the legislature, as may have been expedient in view of the peculiar uses to which the railway track is subjected, has required the railroad company, which necessarily has the general control of its own track, in all cases to provide and maintain the planking, that does not determine the question of compensation. If, as has been suggested, the planking is to be deemed a part of the new highway, the railroad company cannot be

required to construct and maintain it over its own right of way without compensation. Ill. Cent. R. Co. v. City of Bloomington, 76 Ill. 447; City of Erie v. Erie Canal Co., 59 Penn. St. 174. As respects this subject, we see no reason why the decisions above cited as supporting the relator's contention should not be followed. We, therefore, think that the railroad company was entitled to compensation for the expense of providing and of maintaining the planking. There can be no distinction in this respect between the original construction and the subsequent maintenance, and so the authorities above cited affirm. The law requires the railroad company to maintain the planking, and it must be assumed now, when damages are being assessed once for all, that this requirement of the law will remain unchanged."

This case was followed and approved in *State, ex rel., etc., v. Shardlow*, 43 Minn. 524; 46 N. W. Rep'r, 74.

The general question of the power of the state to compel railway companies to construct works or incur expense for the purpose of promoting the safety, convenience or welfare of the community, is discussed in note to *Am. Rapid Tel. Co. v. Hess*, ante, p. 199.

BRIGGS V. SPAULDING.

(Supreme Court of the United States, May 25, 1891.)

1. CORPORATIONS. NATIONAL BANKS. CARE OF DIRECTORS IN THE DISCHARGE OF THEIR DUTIES. The degree of care required of directors depends upon the subject to which it is to be applied, and each case has to be determined in view of its own peculiar circumstances.

2. LIABILITY FOR ACTS OF OTHER DIRECTORS OR AGENTS OF THE CORPORATION. Directors are not insurers of the fidelity of the agents whom they have appointed, who are not their agents, but the agents of the corporation; and they cannot be held responsible for losses resulting from the wrongful acts or omissions of other directors or agents, unless the loss is a consequence of their own neglect of duty, either for failure to supervise the business with attention, or in neglecting to use proper care in the appointment of agents.

3. RESIGNATION OF DIRECTOR OF NATIONAL BANK. STATUTE CONSTRUED. Revised Statutes of the United States, section 5145, providing that directors of national banks shall hold office for one year, and until their successors have been elected and qualified, does not prohibit resignations within the year.

4. SAME. METHOD OF EFFECTING RESIGNATION. ORAL RESIGNATION. Since the national banking law is silent as to the time when, and method by which a director may resign, the common law governs, and where a director verbally resigns to the president, to whom he at the same time sells his stock, giving a power of attorney to transfer it on the books of the bank, which is done, the resignation is effective to release the director from responsibility for the subsequent conduct of the bank's affairs.

5. OFFICER OF BANK ABSENT ON LEAVE. LIABILITY FOR MISMANAGEMENT DURING HIS ABSENCE. The president and director of a national bank, who is absent on account of ill-health, under a leave of absence granted by the board

of directors, cannot be held liable for losses occurring through the negligent management of the bank during his absence.

6. WHEN DIRECTORS NOT LIABLE FOR LOSSES WHICH INVESTIGATION MIGHT HAVE PREVENTED. Where the affairs of a bank are managed by its president, who has the reputation of being trustworthy and efficient, and who owns two-thirds of its stock, and the bank is generally considered to be in a prosperous condition, directors cannot be held liable for losses through mismanagement on the ground of negligence, in that they did not, within ninety days after they became directors, compel the board of directors to make a thorough investigation of the books and condition of the bank or make such investigation themselves.

7. GENERAL DUTY AND LIABILITY OF BANK DIRECTORS. Directors must exercise ordinary care and prudence in the administration of the affairs of a bank, and this includes something more than officiation as figure-heads. They are entitled under the law to commit the banking business, as defined, to their duly-authorized officers, but this does not absolve them from the duty of reasonable supervision, nor ought they to be permitted to be shielded from liability because of want of knowledge of wrong-doing, if that ignorance is the result of gross inattention.

SMITH (subsequently succeeded by Hadley, Hadley by Movius and Movius by Briggs) exhibited his bill, as receiver of the First National Bank of Buffalo, in the circuit court of the United States for the northern district of New York, on the 4th of May, 1883, against Reuben Porter Lee, Francis E. Coit, Elbridge G. Spaulding, William H. Johnson and Thomas W. Cushing, as directors of that bank, and Anne Vought, as executrix of John H. Vought, and Frank S. Coit and Joseph C. Barnes, as administrators of Charles C. Coit, former directors. Francis E. Coit died pending the suit and Caroline E. Coit, executrix, was made a party defendant.

The bill alleged the organization of the bank as a national banking association under the acts of congress in that behalf; that it carried on the business of banking from February 5, 1864, to April 13, 1882; that on the 14th of April, 1882, being then insolvent, it suspended business under and by direction of a bank examiner; and that on the 22d of April complainant was appointed receiver by the comptroller of the currency, qualified April 26, and took possession of the bank's books, records and assets of every description.

That on December 7, 1863, at a preliminary meeting of the subscribers to the stock of the bank, certain articles of association were duly adopted and executed, a copy of which was annexed; that these articles remained unchanged, except that the number

of directors was reduced from nine to five; that by-laws were adopted by the board of directors December 13, 1863, a copy of which was annexed and continued unaltered from thence forward; and that on January 7, 1879, at a meeting of the directors, a resolution was adopted requiring the directors to meet regularly at the bank once in each month to look after the affairs of the bank and transact such business as might come before them. It was further alleged that defendant Lee was a director from January 12, 1877, to April 14, 1882; that defendants Spaulding and Johnson were directors from January 10 until April 14, 1882, "except as the defendant Spaulding was disqualified by the sale of his stock on April 11, 1882;" that defendant Francis E. Coit was a director from May 20, 1881, and so remained, except as disqualified by the sale of his stock, April 11, 1882; that defendant Cushing was a director from June 7, 1879, to January 10, 1882, on which day his successor was elected; that John H. Vought was a director from January, 1865, and remained such, except as he was disqualified by the sale of his stock, January 18, 1882; and that Charles T. Coit was elected a director January 11, 1870, and continued to act as such until about December 11, 1881, when he died intestate, and letters of administration were issued to Frank S. Coit and Joseph C. Barnes as administrators. It was further averred that from June 7, 1879, to December 11, 1881, Charles T. Coit was president of the bank, and defendant Lee its cashier; that down to about October 3, 1881, Charles T. Coit continued in the active discharge of his duties as president, and on that day was given a leave of absence for one year from those duties, and the defendant Lee was made vice-president, and placed in charge of the bank; that Lee also continued to be cashier, and one McKnight was assistant cashier thereof; and that on January 10, 1882, a new board of directors was elected consisting of the defendants Spaulding, Johnson, Francis E. Coit, Lee and Vought, who elected officers for the ensuing year—Lee as president, Francis E. Coit as vice-president, McKnight as cashier, and one Bogert as assistant cashier. The bill then charged that down to about October 3, 1881, being the date when the defendant Lee was made vice-president and placed in charge of the bank, "the said bank was solvent, and engaged in a prosperous business; that the capital stock of said bank was \$100,000,

which was entirely paid up, and was divided into shares of the par value of \$100 each, and that said shares were then salable at not less than \$150 each, and were actually worth about that sum; that from the time of its organization down to said last-mentioned date the said bank had declared and paid dividends on its said capital stock, amounting in the aggregate to upward of two hundred and eighty-five per cent thereon; that said bank then had a surplus or reserve fund representing undivided profits of said bank amounting nominally to seventy-four thousand two hundred and seventy-seven dollars and three cents (\$74,277.03), and had actually a large surplus;" that on April 14, 1882, the bank was largely insolvent; that its surplus and capital stock had been exhausted; that its total liabilities to its creditors, not including the amount of its capital stock, or other liability to its stockholders as such, amounted \$1,160,763.77; that its assets were nominally not less than \$1,351,199.69, not including the liability of the stockholders on their stock; that a large portion of such assets were utterly worthless, and that the deficiency then existing in the good assets as compared with its liabilities was not less than \$535,163.42, or about forty-six per cent of the liabilities; that statements of the nominal financial condition of the bank, as shown by its own books, as of the dates October 3, 1881, January 9, 1882, and April 14, 1882, are annexed; but those of January 9 and April 14 fail to show that "any of the bills discounted or cash items, as therein stated, were worthless or uncollectible, or that the said bank had suffered any considerable loss by reason of bad debts or wasteful management, contrary to the facts as hereinbefore and hereinafter stated." The bill further averred that the greater part of the losses of the bank during the period between October 3, 1881, and April 14, 1882, and the consequent failure of the bank, were due to the misconduct of the officers and directors of the bank, and to the failure of the directors to perform faithfully and diligently the duties of their office; and it was particularly alleged that it was the duty of the directors, "by reason of the nature of their office and of the principles of the common law applicable thereto, and under and by virtue of the provisions of the Revised Statutes of the United States, and of the acts of congress relating to national banks, and of the articles of association and by-laws of the said bank, hereinbefore referred to, diligently, carefully and

honestly to administer the affairs of the said bank ; to employ none but honest and competent persons to serve as officers of the said bank ; to take from all persons so employed sufficient security for the faithful performance of their duties ; to keep correct books of account of all the affairs, business and transactions of the said bank ; to see that the business of the said bank was prudently conducted, and that the property and effects of the said bank were not wasted, stolen or squandered," etc. It was then charged that the directors utterly failed to perform each and every of their official duties, and during all the period from October 3, 1881, to April 14, 1882, paid no attention to the affairs of the bank, failed to hold or call meetings, or to appoint any committee of examination, or to require bonds, or to make personal examinations into the conduct and management of its affairs and into the condition of its accounts, but allowed the executive officers to manage it without supervision.

The bill further charged that the defendants permitted the reserve of the bank to remain below the amount required by section 5191 of the Revised Statutes, and that a large part of the losses of the bank arose from the unlawful extension of its line of discounts, and would have been prevented if the directors had performed their duty and prevented the increase ; that on or about November 7, 1881, the surplus and undivided profits had been exhausted, and the capital stock impaired, and this should have been reported to the comptroller, whereby the capital would have been made good, or the said bank would have necessarily been put into liquidation, and further losses thereafter incurred by continuance of its business would have been stopped. It was also asserted that, independently of the provisions of the acts of congress, the directors were trustees for the bank and its stockholders and creditors, and it was their duty to have ascertained whether the bank had sustained losses, and made known the facts and the general condition of the bank and the methods of its management, which duties they neglected and failed to perform, and by reason thereof the bank sustained great losses, amounting in the aggregate to at least \$685,163.42. It was further alleged that it was unlawful for the bank to allow any one person, company, corporation or firm to become indebted to an amount exceeding one-tenth of the capital stock, excepting by a discount of bills of exchange drawn in good

faith, and of business or commercial paper actually owned by the person negotiating it; but that the directors from October 3, 1881, to April 14, 1882, permitted this to be done, and thereby a loss of at least \$556,215.62 was occasioned; that it was the duty of the directors and officers of the bank to make accurate reports to the comptroller, and they did, October 1, 1881, submit a report, and on December 31, 1881, and March 11, 1882, further reports, but the reports dated December 31, 1881, and March 11, 1882, were false and misleading, and particularly in representing that the bank had a surplus fund and undivided profits, amounting to large sums, and an unimpaired capital, and failing in any way to show that the bank had sustained heavy losses; whereas the bank had not at either of the dates any surplus or undivided profits, and its capital stock was exhausted, or largely impaired, on December 31, 1881, and on March 11, 1882, entirely exhausted, by reason of improvident and careless management, etc.; that by reason of the false and misleading character of the reports the comptroller and stockholders and creditors of the bank were not informed of its actual condition, and failed to take steps to repair the losses or put the bank in liquidation by reason of which the bank incurred further losses. And further, that it was the duty of the directors who were such from October 3, 1881, to April 14, 1882, to appoint only honest, faithful, trustworthy, experienced and competent persons as officers of the bank, and to require bond or other security, and remove them if they were incompetent or untrustworthy in the performance of their duties; that during all that period of time the directors then in office elected and appointed to the positions of president, vice-president and cashier, persons who were unfit, untrustworthy, incompetent and unfaithful, and more particularly in the appointment of Lee as vice-president and president, McKnight and Bogert being mere clerks of the bank, and subject absolutely to the control and direction of Lee; that Francis E. Coit never actually assumed or performed any of the duties properly appertaining to the office of vice-president, and was of no value to the bank as one of its executive officers; that, by reason of the foregoing, Lee, was during all the period from October 3, 1881, down to the stoppage of the bank, in absolute control thereof, without any check, oversight or supervision whatever, which fact was at all times known to the di-

rectors of the bank; that Lee was a person of inconsiderable financial responsibility and of insufficient age and experience to qualify him for the position, and it was an act of gross negligence on the part of the directors to trust the entire management of the bank, or even the proper performance of the duties of president, to Lee; that under Lee's management the line of discounts was increased by lending large sums of money on accommodation paper to Lee personally and to members of his family and his personal friends, and to other persons with whom the said Lee was engaged in speculations, all of whom were of little or no financial responsibility, many of the loans being in excess of the amount allowed by the acts of congress; that Lee failed to take sufficient security for the loans, and in many cases none at all; that Lee himself borrowed large sums of money upon his own notes and by overdrawing his account, and an examination of the books would have disclosed the fact, and that Lee was lending the funds of the bank to individuals of insufficient responsibility, and otherwise improperly managing the affairs of the bank and demonstrating his unfitness for the position; and transactions with one Hall were set forth at length, and other improvident transactions; and it was charged that by reason of Lee's reckless, improvident and criminal conduct the bank, "which had been solvent and in a fair financial condition on the said 3d day of October, 1881, became insolvent, and was compelled to go into liquidation on the 14th day of April, 1882, as hereinbefore alleged;" that all of his acts in effecting the loans appeared on the books, and might have been discovered by the directors by a proper examination, and it was owing to their negligence and inattention to duty that Lee was permitted to continue in office and to continue his mismanagement of the bank's affairs until it had become insolvent. Therefore, the complainant insisted that the directors were responsible for all losses sustained by the bank through the negligence and wrongful conduct of Lee.

It was further alleged that on January 18, 1882, Vought sold his stock in the bank, and that Spaulding and Francis E. Coit sold their stock on April 11, 1882, and that thereby each of them became disqualified to act as a director, but none of them resigned. That on April 14, 1882, the stock was held as follows: Lee, one hundred and seventy shares; Hall, five hundred and

seventy-eight shares, purchased April 11, 1882; Prosser, fifty shares; Barnum, thirty shares; Marshall, ten shares; Mr. Rochester, ten shares, and Mrs. Rochester, twelve shares, all purchased in January, 1882; Gluck, twenty shares, purchased in December, 1881, and ten purchased in January, 1882; Mrs. Stagg, one hundred shares, held since 1864; and defendant Johnson, ten shares, purchased January 9, 1882. That all the stockholders, except Lee, Hall and Johnson, were ignorant of the bank's condition, and innocent of all participation in the negligent and wasteful management of the bank, and have been subjected by reason of the negligence, inattention to duty and wrongful acts of the directors, to a loss equal to double the amount of the par value of their shares of stock, together with the amount of their proportionate interest in the surplus and undivided profits, which their respective interests in the stock of the bank would have brought them if the bank "had continued in the condition in which it was on the said 3d day of October, 1881." And complainant claimed to be entitled to sue for and recover all the losses and damages which the bank, its stockholders and creditors had sustained in the premises.

The bill prayed for answers, the oath not being waived, and for general relief, and was taken as confessed against the defendants R. P. Lee and Anne M. Vought, as executrix of John H. Vought. Spaulding, Johnson, Cushing, the executrix of Francis E. Coit, and the administrators of Charles T. Coit answered severally. These answers denied the jurisdiction of the court, and denied that the receiver could maintain the action as one for equitable relief, and insisted that the remedy, if any, was at law. The answers of the executrix and the administrators denied that the cause of action survived. Cushing claimed that his responsibility, if any, terminated upon the sale of his stock September 24, 1881. The defense was set up on behalf of Charles T. Coit that he could not be held responsible from October 3 to December 11, 1881, when he died, because of his ill-health and absence on the leave granted to him on October 3; and it was insisted on behalf of Francis E. Coit that he should be excused for failure to attend to the business of the bank by reason of his ill-health, so far as he did not attend to it, if responsible at all. The same defense was made on behalf of Johnson, with the added fact of seri-

ous illness in his family, and the age and practical retirement from business of Mr. Spaulding were also set forth. All denied any intentional wrong-doing, or omission of duty, or legal responsibility for the losses. All asserted their confidence in Lee's capacity and integrity and their belief in the sound financial condition of the bank. All denied any neglect of duty in the premises, and it was denied that any special losses occurred from January 10, 1882, to the stoppage of the bank; and asserted on behalf of Spaulding and Francis E. Coit that if any loss happened between the 11th of April and the 14th they could not be held responsible under the bill as framed, as they had parted with their stock and thereby ceased to be directors. Voluminous evidence was taken, and upon the hearing of the cause the bill was dismissed as to defendants Spaulding, Johnson and Caroline E. Coit, executrix, without costs, and as to defendants Cushing and the administrators of Charles T. Coit, with costs. From this decree an appeal was prosecuted to this court. The opinion of the circuit court will be found in 30 Federal Reporter, 298.

The circuit court held that defendant Cushing ceased to be a director of the bank prior to the occurrence of the losses as alleged, and owed no duty in that behalf; and that Charles T. Coit's absence on leave from October 3, 1881, to his death, December 11, 1881, exonerated him; and that defendants Spaulding, Johnson and Francis E. Coit were not liable under the statute, because they did not come within its provisions, nor by the common law, for by that each was liable only for his own miscarriages, and none were shown.

Analey Wilcox, W. Hallett Phillips and John G. Milburn for appellant. *E. C. Sprague, David F. Day, Benj. H. Williams and D. N. Lockwood* for appellees.

Mr. Chief Justice FULLER, after stating the facts as above, delivered the opinion of the court.

In the language of appellant's counsel, the bill was framed upon the theory of a breach by the defendants as directors "of their common-law duties as trustees of a financial corporation, and of breaches of special restrictions and obligations of the national banking act." And it is claimed that the defendants should have been held liable for the losses which occurred through loans of the

bank's funds and moneys during their term of office as directors to Lee, his father, his wife, and certain designated persons, which were the principal losses, though there were others smaller in amount for which they were responsible. This liability is alleged to have been incurred by Lee for all loans from October 3, 1881, until April 14, 1882; by F. E. Coit for all losses through the mismanagement of the bank from October 3, 1881, until April 14, 1882, which could have been prevented by reasonable diligence and care on the part of the directors; by John H. Vought on the same basis and for the same time; by Charles T. Coit from October 3 to December 11, 1881; by Cushing from October 3, 1881, to January 10, 1882, unless his liability terminated with the transfer of his stock on the books of the bank; by Spaulding and Johnson from January 10 to April 14, 1882. It is contended as an independent proposition that each of the defendants should have been held liable for all loans made during the periods before mentioned when the loans exceeded ten per cent of the capital of the bank, in violation of section 5200, Revised Statutes, and also for all loans made while the bank's reserve was below fifteen per cent of its deposits, in violation of section 5191, Revised Statutes, where such loans resulted in losses; and, finally, that each of the defendants should have been held absolutely liable for all losses of the bank incurred by carrying on its business after its capital became impaired or exhausted, and the bank insolvent.

Under section 5136, Revised Statutes, national banking associations were empowered: "Fifth. To elect or appoint directors, and by its board of directors to appoint a president, vice-president, cashier and other officers; define their duties, require bonds of them and fix the penalty thereof; dismiss such officers, or any of them, at pleasure, and appoint others to fill their places. Sixth. To prescribe, by its board of directors, by-laws not inconsistent with law, regulating the manner in which its stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred, its general business conducted, and the privileges granted to it by law exercised and enjoyed. Seventh. To exercise by its board of directors or duly-authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange and other

evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing and circulating notes, according to the provisions of this title." By section 5145 the affairs of each association were to be managed by not less than five directors, to be elected at meetings to be held in January, and to hold office for one year and until their successors were elected and had qualified; and by section 5146 every director was obliged to own in his own right at least ten shares of the capital stock, and, if he ceased to own the required number of shares, or became in any other manner disqualified, he thereby vacated his place. By section 5148 any vacancy in the board was to be filled by an appointment by the remaining directors, and any director so appointed held his place until the next election. Section 5147 provided that "each director, when appointed or elected, shall take an oath that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such association, and will not knowingly violate or willingly permit to be violated, any of the provisions of this title; and that he is the owner in good faith, and in his own right, of the number of shares of stock required by this title," etc. By section 5211 every bank was required to make not less than five reports during each year, under the oath of the president or cashier, and attested by at least three of the directors, exhibiting in detail the resources and liabilities of the bank, and the comptroller could call for special reports. Under section 5240 the appointment of bank examiners was provided for, with power to make thorough examination into the affairs of any bank, and in doing so to examine any of the officers and agents on oath, and make a full and detailed report to the comptroller. Section 5239 is in these words: "If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents or servants of the association to violate, any of the provisions of this title, all the rights, privileges and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper circuit, district or territorial court of the United States, in a suit brought for that purpose by the comptroller of the currency in his own name, before the association shall be declared dissolved. And in cases of such violation every director who participated in or assented to

the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders or any other person shall have sustained in consequence of such violation."

When the banking act was originally passed, and this bank was organized, that which is now subdivision 7 of section 5136 did not contain the words "or duly-authorized officers or agents, subject to law;" that is, the original act provided that the board of directors might exercise all such incidental powers as should be necessary to carry on the business of banking as there specified, but said nothing about the exercise of those powers by the bank officers or agents. The words were inserted in the Revised Statutes 1873-74.

The articles of association of the First National Bank of Buffalo were framed under section 5133, Revised Statutes, and provided for an annual meeting of the stockholders; that the board of directors should appoint a president, cashier and such other officers and clerks as might be required to transact the business of the association and define their respective duties and by their by-laws specify by what officers of the association or committee of the board the regular banking business of the association should be conducted, and empowered the board of directors to require bonds of the officers. The by-laws of the institution were adopted December 13, 1863, and had relation to the then powers of the board of directors. By section 13 a standing committee was provided for, to be known as the "exchange committee," consisting of the president and three directors, appointed by the board every six months, which had power to discount bills, notes, etc., and was required to report at the regular board meetings. Under section 19 a committee was to be appointed every three months to examine into the affairs of the bank and report to the board. Regular meetings were required to be held monthly. It is alleged that on the 7th of January, 1879, the board requested itself to meet thereafter regularly on the 1st of every month, "to look after the affairs of the bank," etc. It appears that the provisions of the by-laws were not observed, at least after the amendment in subsection 7, section 5136, and that the management of the bank was left almost entirely to the officers. No exchange committee nor examination committee was appointed and the meetings of the board were infrequent and perfunctory. For years prior to the

failure — fourteen at least — the business of the bank had been conducted by the president.

It is not contended that the defendants knowingly violated, or permitted the violation of, any of the provisions of the banking act, or that they were guilty of any dishonesty in administering the affairs of the bank; but it is charged that they did not diligently perform duties devolved upon them by the act. Our attention has not been called, however, to any duty specifically imposed upon the directors as individuals by the terms of the act, although, if any director participated in or assented to any violation of the law by the board, he would be individually liable. The corporation, after the amendment of 1874, had power to carry on its business through its officers; and although no formal resolution authorized the president to transact the business, yet, in view of the practice of fourteen years or more, we think it must be held that he was duly authorized to do so. It does not follow that the executive officers should have been left to control the business of the bank absolutely and without supervision, or that the statute furnishes a justification for the pursuit of that course. Its language does enable individual directors to say that they were guilty of no violation of a duty directly devolved upon them. Whether they were responsible for any neglect of the board as such, or in failing to obtain proper action on its part, is another question. Indeed, it is frankly stated by counsel that, "although special provisions of the statute are quoted and relied upon, these do not create the cause of action, but merely furnish the standard of duty and the evidence of wrong-doing;" and section 556 of Morawetz on Private Corporations is cited, which is to the effect that "the liability of directors for damages caused by acts expressly prohibited by the company's charter or act of incorporation is not created by force of the statutory prohibition. The performance of acts which are illegal or prohibited by law may subject the corporation to a forfeiture of its franchises, and the directors to criminal liability; but this would not render them civilly liable for damages. The liability of directors to the corporation for damages caused by unauthorized acts rests upon the common-law rule, which renders every agent liable who violates his authority to the damage of his principal. A statutory prohibition is material, under these circumstances, merely as indicating an express restriction placed

upon the powers delegated to the directors when the corporation was formed." It is perhaps unnecessary to attempt to define with precision the degree of care and prudence which directors must exercise in the performance of their duties. The degree of care required depends upon the subject to which it is to be applied, and each case has to be determined in view of all the circumstances. They are not insurers of the fidelity of the agents whom they have appointed, who are not their agents, but the agents of the corporation; and they cannot be held responsible for losses resulting from the wrongful acts or omissions of other directors or agents, unless the loss is a consequence of their neglect of duty, either for failure to supervise the business with attention, or in neglecting to use proper care in the appointment of agents. *Mor. Priv. Corp.*, § 551 et seq., and cases. Bank directors are often styled "trustees," but not in any technical sense. The relation between the corporation and them is rather that of principal and agent. Certainly so far as creditors are concerned, between whom and the corporation the relation is that of contract, and not of trust. But, undoubtedly, under circumstances, they may be treated as occupying the position of trustees to *cestui que trust*.

In *Percy v. Millaudon*, 8 Mart. (N. S.) 68, which has been cited as a leading case for more than sixty years, the supreme court of Louisiana, through Judge Porter, declared that the correct mode of ascertaining whether an agent is in fault "is by inquiring whether he neglected the exercise of that diligence and care which was necessary to a successful discharge of the duty imposed on him. That diligence and care must again depend on the nature of the undertaking. There are many things which, in their management, require the utmost diligence and most scrupulous attention, and where the agent who undertakes their direction renders himself responsible for the slightest neglect. There are others where the duties imposed are presumed to call for nothing more than ordinary care and attention, and where the exercise of that degree of care suffices. The directors of banks, from the nature of their undertaking, fall within the class last mentioned, while in the discharge of their ordinary duties. It is not contemplated by any of the charters which have come under our observation, and it was not by that of the Planters' Bank, that they should devote their whole time and attention to the institution to

which they are appointed, and guard it from injury by constant superintendence. Other officers, on whom compensation is bestowed for the employment of their time in the affairs of the bank, have the immediate management. In relation to these officers the duties of directors are those of control, and the neglect which would render them responsible for not exercising that control properly must depend on circumstances, and in a great measure be tested by the facts of the case. If nothing has come to their knowledge to awaken suspicion of the fidelity of the president and cashier, ordinary attention to the affairs of the institution is sufficient. If they become acquainted with any fact calculated to put prudent men on their guard, a degree of care commensurate with the evil to be avoided is required, and a want of that care certainly makes them responsible."

Spering's Appeal, 71 Penn. St. 11, was the case of a bill filed by Spering, as assignee of a trust company, against its directors and others, to compel them to make good losses sustained by the depositors on the ground of fraudulent mismanagement of the affairs of the company; and Judge Sharswood, speaking for the court, said: "It is by no means a well-settled point what is the precise relation which directors sustain to stockholders. They are, undoubtedly, said in many authorities to be trustees, but that, as I apprehend, is only in a general sense, as we term an agent or any other bailee intrusted with the care and management of the property of another. It is certain that they are not technical trustees. They can only be regarded as mandataries — persons who have gratuitously undertaken to perform certain duties, and who are, therefore, bound to apply ordinary skill and diligence, but no more. * * * We are dealing now with their responsibility to stockholders, not to outside parties — creditors and depositors. It is unnecessary to consider what the rule may be as to them. Upon a close examination of all the reported cases, although there are many *dicta* not easily reconcilable, yet I have found no judgment or decree which has held directors to account, except when they have themselves been personally guilty of some fraud on the corporation, or have known and connived at some fraud in others, or where such fraud might have been prevented had they given ordinary attention to their duties. I do not mean to say by any means that their responsibility is limited to these cases, and that

there might not exist such a case of negligence, or of acts clearly *ultra vires*, as would make perfectly honest directors personally liable. But it is evident that gentlemen selected by the stockholders from their own body ought not to be judged by the same strict standard as the agent or trustee of a private estate. Were such a rule applied, no gentlemen of character and responsibility would be found willing to accept such places." And see *Association v. Coriell*, 34 N. J. Eq. 383; *Hodges v. Screw Co.*, 1 R. I. 312; *Wakeman v. Dalley*, 51 N. Y. 27. It was in this aspect that Lord Hatherley remarked in *Land Credit Co. v. Lord Fermoy*, L. R., 5 Ch. 763: "Whatever may be the case with a trustee a director cannot be held liable for being defrauded. To do so would make his position intolerable." And the same view is expressed by Sir George Jessel, M. R., in his opinion in *Re Dean Coal Min. Co.*, 10 Ch. Div. 450, where he says: "One must be very careful in administering the law of joint-stock companies not to press so hard on honest directors as to make them liable for these constructive defaults, the only effect of which would be to deter all men of any property, and perhaps all men who have any character to lose, from becoming directors of companies at all. On the one hand, I think the court should do its utmost to bring fraudulent directors to account; and, on the other hand, should also do its best to allow honest men to act reasonably as directors. Willful default no doubt includes the case of a trustee neglecting to sue, though he might by suing earlier have recovered a trust fund. In that case he is made liable for want of due diligence in his trust. But I think directors are not liable on the same principle." The theory of this bill is that the defendants are liable, not to stockholders nor to creditors, as such, but to the bank, for losses alleged to have occurred during their period of office, because of their inattention. If particular stockholders or creditors have a cause of action against the defendants individually, it is not sought to be proceeded on here, and the disposition of the questions arising thereon would depend upon different considerations.

In *Preston v. Prather*, 137 U. S. 604; 11 Sup. Ct. Rep'r, 162, it was ruled that gratuitous bailees of another's property are not responsible for its loss unless guilty of gross negligence in its keeping; and whether that negligence existed or not is a question of fact for a jury to determine, or to be determined by

the court where a jury is waived. And, further, that the reasonable care which the bailee of another's property intrusted to him for safe-keeping without reward must take, varies with the nature, value and situation of the property, and the bearing of surrounding circumstances on its security. That was a case of persons engaged in the business of banking receiving for safe-keeping a parcel containing bonds, which was put in their vaults. They were notified that their assistant cashier, who had free access to the vaults where the bonds were deposited, and who was a person of scant means, was engaged in speculations in stocks. They made no examination of the securities deposited with them, and did not remove the cashier. He stole the bonds so deposited; and it was held that the bankers were guilty of gross negligence, and were liable to the owner of the bonds for their value at the time they were stolen. And Mr. Justice Field, delivering the opinion, said: "Undoubtedly, if the bonds were received for safe-keeping, without compensation to them in any form, but exclusively for the benefit of the plaintiffs, the only obligation resting upon them was to exercise over the bonds such reasonable care as men of common prudence would usually bestow for the protection of their own property of a similar character. No one taking upon himself a duty for another without consideration is bound, either in law or morals, to do more than a man of that character would do generally for himself under like conditions." No one of the defendants is charged with the misappropriation or misapplication of or interference with any property of the bank nor with carelessness in respect to any particular property, but with the omission of duty which, if performed, would have prevented certain specified losses, in respect of which complainant seeks to charge them.

The doctrine that one trustee is not liable for the acts or defaults of his co-trustees, and while, if he remains merely passive, and does not obstruct the collection by a co-trustee of moneys, is not liable for waste, is conceded; but it is argued that if he himself receives the funds, and either delivers them over to his associate, or does any act by which they come into the possession of the latter or under his control, and but for which he would not have received them, such trustee is liable for any loss resulting from the waste (*Brueu v. Gillet*, 115 N. Y. 10; 21 N. E. Rep'r, 676;

2 Pom. Eq. Jur., §§ 1069, 1081), and that this case comes within the rule as thus qualified. Treated as a cause of action in favor of the corporation, a liability of this kind should not lightly be imposed in the absence of any element of positive misfeasance, and solely upon the ground of passive negligence; and it must be made to appear that the losses for which defendants are required to respond were the natural and necessary consequence of omission on their part. And in this connection the remarks of Mr. Justice Bradley in *Railroad Co. v. Lockwood*, 17 Wall. 357, 382, may well be quoted: "We have already adverted to the tendency of judicial opinion adverse to the distinction between gross and ordinary negligence. Strictly speaking, these expressions are indicative rather of the degree of care and diligence which is due from the party, and which he fails to perform, than of the amount of inattention, carelessness or stupidity which he exhibits. If very little care is due from him, and he fails to bestow that little, it is called 'gross' negligence. If very great care is due, and he fails to come up to the mark required, it is called 'slight' negligence. And if ordinary care is due, such as a prudent man would exercise in his own affairs, failure to bestow that amount of care is called 'ordinary' negligence. In each case the negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands, and hence it is more strictly accurate, perhaps, to call it simply 'negligence.' And this seems to be the tendency of modern authorities. If they mean more than this, and seek to abolish the distinction of degrees of care, skill and diligence required in the performance of various duties and the fulfillment of various contracts, we think they go too far, since the requirement of different degrees of care in different situations is too firmly settled and fixed in the law to be ignored or changed." In any view the degree of care to which these defendants were bound is that which ordinarily prudent and diligent men would exercise under similar circumstances, and in determining that the restrictions of the statute and the usages of business should be taken into account. What may be negligence in one case may not be want of ordinary care in another, and the question of negligence is, therefore, ultimately a question of fact, to be determined under all the circumstances. The alleged liability of the defendants is such that the facts must be examined as to each of them.

As to the defendant Cushing, the evidence establishes that on the 24th of September, 1881, he resigned his office as a director of the bank verbally to Charles T. Coit, the then president, and on that day sold to Mr. Coit the ten shares of the capital stock of which he was the owner. The books of the bank show the sale and transfer as of September 24, 1881, but the certificate and power of attorney authorizing the transfer were apparently not delivered until October 7, when the money was paid, being \$125 per share. According to the recollection of Lee, the entry in the transfer-book was not made until November, when he thinks the stock was sent up to him by Mr. Coit from New York city, but he was informed of Mr. Cushing's resignation of his position as director on October 3, 1881, by Mr. Coit, who was then president of the bank. This was brought out upon cross-examination, after complainant had examined Lee in chief in relation to Cushing's resignation, and the vacancy created by the transfer of his stock. Cushing testified that the transfer was made on September 24, 1881, and we cannot hold that the circuit court erred in concluding that that testimony, coupled with the evidence of the record, outweighed the testimony of Lee, which was, indeed, of minor importance if the resignation had taken effect as stated. It is objected that the evidence of Cushing was incompetent, but we do not find that this objection was made when Cushing was examined and cross-examined as a witness. Nor do we think the evidence incompetent as against complainant. Rev. St., § 853; Code Civ. Proc. N. Y., § 829; *Bank v. Jacobus*, 109 U. S. 275; 3 Sup. Ct. Rep'r, 219; *Snyder v. Fielder*, 139 U. S. 478; 11 Sup. Ct. Rep'r, 583. In *Whitney v. Butler*, 118 U. S. 655; 7 Sup. Ct. Rep'r, 61, it was held that where stock had been sold, and the certificate, with power of attorney for transfer duly executed in blank, delivered to the president of the bank, the responsibility of the original stockholder terminated. And Mr. Justice Harlan said for the court: "It was suggested in argument that the defendants should have seen that the transfer was made. But we were not told precisely what ought to have been done to this end that was not done by them and their agents. Had any thing occurred that would have justified the defendants in believing, or even in suspecting, that the transfer had not been promptly made on the books of the bank, they would, perhaps, have been

wanting in due diligence had they not, by inspection of the bank's stock-register, ascertained whether the proper transfer had in fact been made. But there was nothing to justify such a belief or to excite such a suspicion. Their conduct was, under all the circumstances, that of careful, prudent business men; and it would be a harsh interpretation of their acts to hold (in the language of some of the cases, when considering the general question under a different state of facts) that they allowed or permitted the name of Whitney to remain on the stock-register as a shareholder. We are of opinion that, within a reasonable construction of the statute, and for all the objects intended to be accomplished by the provision imposing liability upon shareholders for the debts of national banks, the responsibility of the defendants must be held to have ceased upon the surrender of the certificates to the bank and the delivery to its president of a power of attorney sufficient to effect, and intended to effect, as that officer knew, a transfer of the stock on the books of the association to the purchaser." Tested by this rule, the conclusion of the circuit court on the matter was correct. The resignation was orally tendered to the president, and manifestly accepted by him, since the sale of the stock was made at the same time, and the president informed the cashier of the fact a few days afterward. Putting a resignation in writing is the more orderly and proper mode of procedure; but if the fact exists, and is adequately proven, the result is necessarily the same, as applied to this case. We do not understand that because section 5145 of the Revised Statutes provides that directors shall hold office for one year and until their successors have been elected and have qualified, this prohibits resignations during the year; and while the banking law is silent as to the time when and the method by which the office of director may be resigned, we think that leaves it as at common law, and that this resignation was effective. *Rex v. Mayor*, 1 *Ld. Raym.* 563; *Olmsted v. Dennis*, 77 *N. Y.* 378; *Chandler v. Hoag*, 2 *Hun*, 613; 63 *N. Y.* 624; *Bruce v. Platt*, 80 *N. Y.* 379; *Port Jervis v. Bank*, 96 *N. Y.* 550. Having sold his stock September 24, and resigned his position, Mr. Cushing did not thereafter act as a director, and was not present at the meetings of October 3 and December 17, 1881, and January 10, 1882. The bill alleges that the bank was entirely solvent on October 3, and engaged in a prosperous business, with a large surplus,

the shares commanding a premium of fifty per cent. Upon this question there was no issue made as between complainant and Cushing, and while, as hereafter stated, we believe the bank to have been hopelessly insolvent at that date, the case must be determined upon the allegations of the bill, and there is nothing in the report to cast the least suspicion upon the good faith of the transaction. There is no charge of breach of trust prior to the resignation and sale, and the decree as to Cushing must be affirmed.

Charles T. Coit had been the first cashier of the bank, and was elected a director in 1870. He was its president from June, 1879, to the date of his death on December 11, 1881. On October 3, 1881, a meeting of the board of directors was held, at which Charles T. Coit, Francis E. Coit, Vought and Lee were present. Cushing, who had resigned on the 24th of September, was absent. It appears that at this meeting a resolution was adopted giving Charles T. Coit, the president, a leave of absence on account of ill-health for one year. No one was elected president prior to January 10, 1882, in his place. There is no doubt of the severity of his illness and the necessity for his absence; but it is contended that the resolution referred to absence as president, and not as director, and that no power existed to allow leave of absence to a member of the board, and so that the resolution should be limited to excuse him from attendance at the bank, but not to permit him to leave the city; and it is said that if he wished to be absolved from responsibility while absent in search of restored health, he should have resigned. If such were the rule, we apprehend that moneyed corporations would find extreme difficulty in obtaining proper persons to act as directors. But it is not the rule. Mr. Coit was guilty of no want of ordinary care in acting upon the leave of absence, and is not to be held because he did not resign. Invalids are permitted to indulge in the hope of recovery, and are not called upon by reason of illness to retire at once from the affairs of this world, and confine themselves to preparation for their passage into another. There was here no neglectful abandonment of duty from October 3 to December 11, and the decree in favor of the administration of Charles T. Coit was properly rendered.

We pass, then, to the inquiry as to the liability of defendants Spaulding and Johnson. In what did their negligence consist,

and were losses occasioned by that negligence, and what losses? Their conduct is to be judged not by the event, but by the circumstances under which they acted. Johnson had done business with the bank since 1865, and from 1879 had been a customer individually, and also connected with several firms who kept accounts with the bank and had a line of discounts there. When requested by Lee in December, 1881, to fill one of the vacancies created by the resignation of Cushing and the death of Charles T. Coit, he objected to doing so, on the ground of want of knowledge of the banking business, and the fact that the nature of his own business carried him away considerably from the city; but, finally, upon being informed that the bank was in prosperous condition, and that much of his time would not be required, accepted. After the 10th of January, he was in the bank from time to time, and inquired about its business, and was told by Lee that every thing was going on well. At Lee's request he signed the report of March 11, 1882, which had been sworn to by the cashier, and signed by Francis E. Coit before Johnson signed it. He was informed that the report contained a correct exhibit of the condition of the bank as shown by its books; and Lee testified that it did, and that, if incorrect, the error could not have been detected by an examination of the books and papers of the bank. Very soon after the 10th of January, Mrs. Johnson became perilously ill, and Johnson, through the extra strain put upon him, fell himself into such a physical and mental condition as incapacitated him from properly attending to business. Spaulding had had a large and various experience, and, as a member of congress, drafted the original national banking act, was president of a leading bank, and connected with several financial corporations, and testified that the practice of banks, so far as he knew, all over the country, was to a large extent to carry on the business through their executive officers, especially where these officers held a majority of the stock; that when he purchased his stock he believed this bank was being conducted by its duly-authorized officers, and his judgment was that his duty as a director was discharged if he attended the meetings to which he was summoned, performed such duties as were specifically required of him, and gave such advice as was asked from him; that his summers were spent upon his farm in the country; that in 1882 he was seventy-two years of age; that he

was in a measure retired from business, so that he gave very little attention to the affairs of his own bank, but was ready to give any advice or suggestions when called upon for that purpose upon any special matters; that for many years it had been the practice in the corporation in which he was a director to treat him as an advisory director, and not as a director occupied in the daily management of their affairs; and that he accepted the position upon the understanding that he should occupy this relation. He set forth in his answer, which was made under oath, as required by the bill, and which was, therefore, evidence, that it was well known to the stockholders and most other persons dealing with the bank that he had retired from active pursuits, and that it was only expected of him by the stockholders and the depositors of the bank that he should more especially perform such duties as he should be specifically required to perform by its board of directors and officers, and that he should impart such advice in its management as he should be asked to give in the course of its business. He further stated that he never received or expected to receive any compensation or benefit from the bank as a director; that Lee was the owner of a large majority of the stock; that, as is customary in such cases, Lee had assumed, to a large extent, the management and control of the bank, with the knowledge of the other directors, and with the knowledge of the stockholders of the bank, and most, if not all, of the depositors therein; and upon information and belief "that long before he became a stockholder of said bank, and up to the time he became such stockholder, and while he was such stockholder, it was understood by all persons having dealings with the said bank that the said Lee practically administered the affairs thereof, as its chief executive officer."

A large amount of evidence was given tending to show that nearly, if not all, of the present creditors of the bank were familiar with the fact that the business of the bank was conducted, so far as its discounts and other banking business was concerned, without the intervention of the board of directors or a committee of that board. Mr. Spaulding further testified that he never received any notice to attend directors' meetings; that he had no actual knowledge of the by-laws; that he was not appointed on any committee, or requested to perform any duty; that he supposed the bank was in a prosperous condition down to the day of

its failure ; that he had confidence in Lee's capacity and integrity, and that the business of the bank was being conducted safely and prosperously under his management ; that he talked with Lee in regard to the affairs of the bank, who told him the bank was in good condition ; that he examined the reports made to the comptroller, December 31, 1881, and March 11, 1882, and saw by them that every thing was going right ; and that he knew the duty of making an examination had not been devolved upon him ; and further stated that it would have taken a month to have ascertained whether the reports to the comptroller were correct, and that it was the duty of the comptroller and the bank examiner to do so. The evidence fairly establishes that this bank was in good credit up to the time of its failure. It had been in existence for eighteen years ; had been prosperous ; had paid dividends regularly down to and into 1881, and its stock had for years stood far above par — at fifty per cent above, October 3, 1881, according to complainant. Neither the defendants, nor the bank's customers, nor the community, appear to have entertained the least suspicion as to its solvency. The losses which it is claimed rendered it insolvent, and for the recovery of which losses this action was instituted, occurred by reason of the discounting by Lee of the paper of persons engaged with him in outside business and speculations, who were not adequately responsible for their engagements. The vice in the situation lay, not in the reports nor in the books, upon their face, but in the unreliability of the bills receivable. Were these defendants guilty of negligence in allowing Lee to remain in charge of the bank ? Would they have been so guilty if they had put him in charge for the first time on the 10th of January ? It appears that Lee went into the employment of this bank in 1868, being then eighteen years old, and so remained until April 14, 1882, occupying in succession the positions of messenger boy, book-keeper, teller, assistant cashier, cashier, vice-president and president. He was the son of an old and well-known citizen of Buffalo, a graduate of its high school, was or had been one of the trustees and treasurer of a leading church in Buffalo, treasurer of the Young Men's Christian Association and a member of the Young Men's Association. His general character was good, his reputation for integrity and financial capacity excellent, and he possessed the confidence of his fellow-citizens. Upon the 10th of

January, 1882, he was the owner of two-thirds of the stock of the bank, and had apparently a greater interest than any other person in seeing that its affairs were so managed that its capital would remain unimpaired. The business of the bank had been conducted for years by the president, assisted by the other executive officers, and it had seemingly been well conducted. Lee was selected to assume the management when Charles T. Coit retired in October, 1881, by the then board of directors, and there was nothing to indicate that the choice was not a proper and fit one. We think no jury would have been justified in finding defendants guilty of negligence in retaining Lee in the management of the bank. Nor was there any violation of law in permitting him to conduct its business, for he was duly authorized to do so under the provisions of the act. We do not mean that this dispensed with reasonable oversight by the directors, but that belongs to a different branch of inquiry.

But it is contended that defendants should have insisted on meetings of the board of directors, or had special meetings called, and at those meetings or otherwise made personal examination into the affairs of the bank, and that, had they done this, they would have discovered the condition of the bank, and prevented losses occurring subsequently to the 10th of January. Here, again, it should be observed that even trustees are not liable for the wrongful acts of their co-trustees unless they connive at them or are guilty of negligence conducive to their commission, and that Lee and Vought had long been directors. It is shown that for fourteen years the affairs of the bank had been left wholly with the president and cashier, and that from the 10th of January to the stoppage of the bank the business was done as it had always been done. No bonds had been required of the officers for at least fourteen years. No meetings were held by the board of directors except the annual meeting and meetings to declare dividends, or on some special occasion. No exchange committee had been appointed since 1875; and no committees had ever been appointed to examine into the bank's affairs, question its cashier, or compare its assets and liabilities with the balances on the general ledger. So that this manner of conducting the business had been sanctioned by long-continued usage, and the evidence tends to show that the method pursued must have been and was well known

to many of its customers, including those who were creditors at the time of its failure, as well as its stockholders. All this was not as it should have been, and ought not to be countenanced; but the facts have an important bearing on the question whether Spaulding and Johnson should be held liable because they did not at once endeavor to change the entire methods of doing business, and enter upon an exhaustive investigation of the assets. Would ordinarily prudent and diligent men have done so under similar circumstances? It is not so much a question of holding meetings as of examination, searching and thorough; an overhauling of the bills receivable, and the detection of the uncollectible indebtedness which rendered the bank insolvent. Were Spaulding and Johnson guilty of negligence in that they did not make such an examination within ninety days after they became directors, in the teeth of the assurances of Lee, in whom they reposed confidence, who had been connected with the bank for so many years, and who owned two-thirds of the stock? The kind of examination required is indicated by the fact that, although the evidence leaves it beyond question that the bank was insolvent on the 8d of October, 1881, its capital and surplus wholly exhausted, and losses incurred for thousands of dollars beyond that amount, complainant, after a year's close investigation, alleges that the bank was at that time solvent, engaged in a prosperous business, with an unimpaired capital and a surplus, and with stock standing at fifty per cent above par. Indeed, the books and papers of the bank were kept in such a condition that even the cashier swore that he did not suspect any thing wrong in the management until April 10, 1882. There were, it is true, two transactions in violation of the provisions of the banking law, not entered on the books, and to which the learned circuit judge refers. On the 18th of January, 1882, Lee took \$23,680 from the cash of the bank, which he replaced by a slip of paper, with the amount on it, in the cash drawer. This was called a "cash item," and was thereafter counted as cash. It was reduced from time to time, until on April 12 it was \$12,405. On February 15 he took \$16,737.50 in the same way from the bank's cash, and placed a similar slip in the drawer. This was reduced by April 12 to \$11,435. These transactions were not concealed from the cashier and subordinate officers of the bank, yet, in view of Lee's position and character,

excited no suspicion, and the directors were not informed of the facts. Again, under section 5200, Revised Statutes, the total liabilities for money borrowed to any national banking association of any person, company, etc., should at no time exceed one-tenth part of the capital stock, but the discount of bills of exchange drawn in good faith against actually existing values, and of commercial or business paper actually owned by the person negotiating the same, is not to be considered as money borrowed. This provision was grossly violated; but, while Lee testified in chief for complainant that the directors could have ascertained from an examination of the books, papers and notes whether or not the loans, which exceeded \$10,000, were for discounts of bills of exchange or business paper, within the exception, he stated, on cross-examination, that it would not have been possible, from an inspection of the paper simply, or an examination of the books of the bank, or both, to have made the discovery, thus drawing a recognized distinction between bare inspection and thorough examination, a distinction also applicable to loans when the reserve was below fifteen per cent of the deposits, and generally. We are impressed by the evidence with the conviction that a cursory glance would not have been enough.

Would it not have been the exercise of an extraordinary degree of care if these defendants had insisted within the first ninety days upon making such an examination? Certainly it cannot be laid down as a rule that there is an invariable presumption of rascality as to one's agents in business transactions, and that the degree of watchfulness must be proportioned to that presumption. "I know of no law," said Vice-Chancellor McCoun, in *Scott v. Depeyster*, 1 Edw. Ch. 513, "which requires the president or directors of any moneyed institution to adopt a system of espionage in relation to their secretary or cashier or any subordinate agent, or to set a watch upon all their actions. While engaged in the performance of the general duties of their station, they must be supposed to act honestly until the contrary appears; and the law does not require their employers to entertain jealousies and suspicions without some apparent reason. Should any circumstance transpire to awaken a just suspicion of their want of integrity, and it be suffered to pass unheeded, a different rule would prevail if a loss ensued. But, without some fault on the part of the directors,

amounting either to negligence or fraud, they cannot be liable." Nor is knowledge of what the books and papers would have shown to be imputed. In *Wakeman v. Dalley*, 51 N. Y. 32, Judge Earl observed in relation to Dalley, sought to be charged for false representations in the circular of a company of which he was one of the directors: "He was simply a director, and as such attended some of the meetings of the board of directors. As he was a director, must we impute to him, for the purpose of charging him with fraud, a knowledge of all the affairs of the company? If the law requires this, then the position of a director in any large corporation, like a railroad, or banking or insurance company, is one of constant peril. The affairs of such a company are generally, of necessity, largely intrusted to managing officers. The directors generally cannot know, and have not the ability or knowledge requisite to learn by their own efforts, the true condition of the affairs of the company. They select agents in whom they have confidence, and largely trust to them. They publish their statements and reports, relying upon the figures and facts furnished by such agents; and if the directors, when actually cognizant of no fraud, are to be made liable in an action of fraud for any error or misstatement in such statements and reports, then we have a rule by which every director is made liable for any fraud that may be committed upon the company in the abstraction of its assets and diminution of its capital by any of its agents, and he becomes substantially an insurer of their fidelity. It has not been generally understood that such a responsibility rested upon the directors of corporations, and I know of no principle of law or rule of public policy which requires that it should." And so Sir George Jessel, in *Hallmark's Case*, 9 Ch. Div. 332: "It is contended that Hallmark, being a director, must be taken to have known the contents of all the books and documents of the company, and so to have known that his name was on the register of shares for fifty shares. But he swears that in fact he did not know that any shares had been allotted to him. Is knowledge to be imputed to him under any rule of law? As a matter of fact, no one can suppose that a director of a company knows every thing which is entered in the books, and I see no reason why knowledge should be imputed to him which he does not possess in fact. Why should it be his duty to look into the list of share-

holders? I know no case, except *Ex parte Brown*, 19 Beav. 97, which shows that it is the duty of a director to look at the entries in any of the books; and it would be extending the doctrine of constructive notice far beyond that or any other case to impute to this director the knowledge which it is sought to impute to him in this case."

We are of opinion that these defendants should not be subjected to liability upon the ground of want of ordinary care, because they did not compel the board of directors to make such an investigation, and did not themselves individually conduct an examination during their short period of service; or because they did not happen to go among the clerks, and look through the books, or call for and run over the bills receivable. Of course a thorough examination would have ascertained that the bank ought to be put into liquidation at once. Nothing that could have been done on or after the 10th of January would have saved it. Insolvent on the 3d of October, its condition had changed for the worse January 10. And it is worthy of notice that the persons or firms, losses by reason of advances to whom are named in argument as the main cause of the failure and basis of recovery, were all debtors of the bank October 3, 1881, some of them for a long time before, and all debtors January 10, 1882, and the figures of the experts seem to show that the amounts due from them at the latter date were not many thousand dollars greater in the aggregate on April 14, 1882. The indebtedness of Lee, his father, and his wife was nominally less, while that of some of those through whom he appears to have conducted his operations was larger. According to him, such increase in poor assets as there was was substantially attributable to increased loans made in the hope of carrying through parties already in debt to the bank, and he says that there was really no material change in the character of the paper between January 9 and the stoppage of the bank. But it is unnecessary to do more than refer to these matters as indicative of the uncertainty as to what losses would have been prevented if the bank had been wound up earlier than it was, and as to the point of time to which the supposed liability should be referred if an interlocutory decree had been entered. We are not disposed, therefore, to reverse the decree as to defendants Spaulding and Johnson, and, although the case of Francis E.

Coit was in some aspects different, and particularly in that he was a director for a longer period, we think it should take the same course. He was elected a director May 20, 1881, to fill a vacancy created by the death of George Coit. He was at the time an invalid, and by reason of his infirmity in health unable to transact business, at least with facility. His co-directors at the time of his election were Charles T. Coit, Vought, Cushing and Lee. He was re-elected January 10, 1882. The evidence shows that he had for many years been afflicted with rheumatism. So far as appears, Lee, Vought and Cushing were in good health, although Charles T. Coit was not, but the latter continued in the management of the bank down to the 3d of October. While it may be said that Francis E. Coit should not have accepted the position of director, and should not have allowed himself to be re-elected, yet upon this question of passive negligence the rule would be an exceedingly rigorous one which made no allowance for the person charged under such circumstances; and upon the whole we do not feel called upon to question the decision as to him. It must be remembered that in cases turning upon questions of fact in order to reverse, we must be prepared to hold that the findings were not justified, and this we cannot do, taking into consideration all the facts contained in this voluminous record, which we have attempted thoroughly to explore. The turning point, so far as defendants Spaulding and Johnson are concerned (and we include with them Francis E. Coit), is whether under all the circumstances they were guilty of negligence, producing any of the losses in question, not affirmatively, but because they did not prevent them; and this depends upon whether they should have made an examination of the books and assets of the bank, and whether, if they had, that would have enabled them to discover such a condition of affairs as would have resulted in placing the bank in liquidation, and whether thereby some of the losses would have been averted. Without reviewing the various decisions on the subject, we hold that directors must exercise ordinary care and prudence in the administration of the affairs of a bank, and that this includes something more than officiating as figure-heads. They are entitled under the law to commit the banking business, as defined, to their duly-authorized officers, but this does not absolve them from the duty of reasonable supervision, nor ought they to be

permitted to be shielded from liability because of want of knowledge of wrong-doing, if that ignorance is the result of gross inattention ; but in this case we do not think these defendants fairly liable for not preventing loss by putting the bank into liquidation within ninety days after they became directors, and it is really to that the case becomes reduced at last. For the reasons given, the decree will be affirmed.

HARLAN, J. (dissenting). Mr. Justice Gray, Mr. Justice Brewer, Mr. Justice Brown, and myself are unable to concur in the opinion and judgment of the court.

We accept as sufficient the reasons given for the exemption of the estate of Charles T. Coit and of Cushing from liability for the losses of the bank here in question. But we are of opinion that, under the evidence, the defendants Elbridge G. Spaulding, Francis E. Coit and W. H. Johnson became respectively liable for such of those losses as could have been prevented by proper diligence upon their part as directors. It would serve no useful purpose to refer in detail to all the evidence establishing their dereliction of duty. In our opinion, the proof is clear and convincing that a considerable part of the amount lost to the bank, and, therefore, to its stockholders and depositors, could have been saved if they had exercised such care in the supervision and management of the bank's business as men of ordinary diligence exercise in respect to their own business. In fact, those gentlemen, while they were directors, had no knowledge whatever of what was being done by Lee in the conduct of the bank. They took his word that all was right, and gave no attention whatever to the management of its business. Their eyes were as completely closed to what he did from day to day in directing the affairs of the bank, as if they had deliberately determined not to see and not to know how he controlled its business. In the cases of Francis E. Coit and Johnson there are some mitigating circumstances arising out of the condition of their health at particular dates, but they are not such as to relieve them from the responsibility they assumed by becoming directors. When Lee asked Johnson to become a director, the latter expressed doubt as to whether he could give the bank much of his time. But Lee said to him that he "could fix that all right." Johnson having upon

one occasion inquired in a general way how the bank was getting on, Lee replied, "Nicely;" and Johnson was satisfied. Both Francis E. Coit and Johnson signed reports to the comptroller of the treasury that were false and fraudulent, without having the slightest knowledge of their truth or falsity. They signed and certified to their correctness entirely upon their faith in Lee. They acted as if confidence in him discharged them from all responsibility touching the management of the bank.

In the case of Mr. Spaulding there are absolutely no circumstances of a mitigating character. He was learned in the law, and had large experience in banking. He accepted the position of director to accommodate Lee, and without any examination of the condition of the bank. Lee told him the bank was all right; and upon that, and that alone, he rested with implicit confidence. Having taken the oath required by the statute, that he would, so far as the duty devolved upon him, diligently and honestly administer the affairs of the association, and having ascertained that the executive officers were in charge of the bank, performing the duties belonging to their respective positions, he did not, he says, "go any further." Under such circumstances, and as he interpreted the national banking act, he felt himself "relieved from any specified duty." He "had no knowledge of either the provisions of the by-laws or articles of association." In his opinion, if the directors imposed upon the executive officers of the bank the duty of conducting its business, the duties of directors became thereafter "nominal." He performed no duty while he was director, except "to examine the reports;" but he made no examination to ascertain their correctness. He says: "I regarded my duty as ended, to a great extent, when I saw the bank was in the same charge that it had been." Being asked whether he went to the bank and made an examination of its books, papers or affairs, he replied: "I did not. I took Mr. Lee's word for it." When asked in reference to the enormous overdrafts, made while he was director, and whether he did any thing to prevent them, he replied: "I didn't go to the bank to ascertain. I left the officers in charge as I found them." In response to the question whether from the 10th day of January down to the failure of the bank, he had any thing to do with the affairs of the bank, aside from holding ten shares of its stock, he said: "I never examined

its books or affairs, and I only examined the reports which it made to the comptroller, whose duty it was to see that those reports were correct." He never requested any of his co-directors, or any officer of the bank, to call a meeting of the board of directors, for, said he, "that duty was devolved upon the cashier." Lastly, and as sufficient evidence that the directors abandoned to Lee the absolute control of all the bank's affairs, and forbore to exercise the slightest control or supervision over him or them, only two meetings of the directors were held from October 3, 1881, until the bank closed its doors on the 14th of April, 1882, over the whole of which period the dishonest practices of Lee extended — one, December 12, 1881, for the purpose only of passing resolutions relating to the death of Charles T. Coit; and the other, January 10, 1882, when Spaulding and Johnson were made directors.

One of the by-laws provided for regular meetings of the board of directors on the first Tuesday in every month. But he had no knowledge of such a by-law, or of any such meetings. It is plain from the evidence that if, with his long experience in banking business, he had given one hour, or at the utmost a few hours' time, in any week while he was director, to ascertain how this bank was being managed, he would have discovered enough that was wrong and reckless to have saved the association, its stockholders and depositors, many, if not all, the losses thereafter occurring. Upon his theory of duty, the only need for directors of a national bank is to meet, take the required oath to administer its business diligently and honestly, turn over all its affairs to the control of some one or more of its officers, and never go near the bank again, unless they are notified to come there, or until they are informed that there is something wrong; and when it is ascertained that these officers, or some of them, while in full control, have embezzled or recklessly squandered the assets of the bank, the only comfort that swindled stockholders and depositors have is the assurance, not that the directors have themselves diligently administered the affairs of the bank, or diligently supervised the conduct of those to whom its affairs were committed by them, but that they had confidence in the integrity and fidelity of its officers and agents, and relied upon their assurance that all was right. No bank can be safely administered in that way.

Such a system cannot be properly characterized otherwise than as a farce. It cannot be tolerated without peril to the business interests of the country.

We are of opinion that when the act of congress declared that the affairs of a national banking association shall be "managed" by its directors and that the directors should take an oath to "diligently and honestly administer" them, it was not intended that they should abdicate their functions and leave its management and the administration of its affairs entirely to executive officers. True, the bank may act by "duly-authorized officers or agents" in respect to matters of current business and detail that may be properly intrusted to them by the directors. But certainly congress never contemplated that the duty of directors to manage and to administer the affairs of a national bank should be in abeyance altogether during any period that particular officers and agents of the association are authorized or permitted by the directors to have full control of its affairs. If the directors of a national bank chose to invest its officers or agents with such control, what the latter do may bind the bank as between it and those dealing with such officers and agents. But the duty remains, as between the directors and those who are interested in the bank, to exercise proper diligence and supervision in respect to what may be done by its officers and agents.

As to the degree of diligence and the extent of supervision to be exercised by directors, there can be no room for doubt under the authorities. It is such diligence and supervision as the situation and the nature of the business require. Their duty is to watch over and guard the interests committed to them. In fidelity to their oaths and to the obligations they assume, they must do all that reasonably prudent and careful men ought to do for the protection of the interests of others intrusted to their charge.

In respect to the dealings of a bank with others this court has said: "Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business and to exercise reasonable control and supervision of its officers. They have something more to do than, from time to time, to elect the officers of the bank and to make declarations of dividends. That which they ought, by proper diligence, to have

known as to the general course of business in the bank, they may be presumed to have known, in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business." *Martin v. Webb*, 110 U. S. 7, 15; 3 Sup. Ct. Rep'r, 428. A rule no less stringent should be applied as between a banking association and directors representing the interests of stockholders and depositors. Subscriptions to the stock of a banking association and deposits with it are made in reliance upon the statutory requirement, which cannot be dispensed with, that its affairs are to be managed and administered by a board of directors, acting under oath and with such diligence as the situation requires.

In *Cutting v. Marlor*, 78 N. Y. 454, 460, Chief Justice Church, delivering the unanimous judgment of the court, said: "A corporation is represented by its trustees and managers. Their acts are its acts, and their neglect its neglect. The employment of agents of good character does not discharge their whole duty. It is misconduct not to do this, but, in addition, they are required to exercise such supervision and vigilance as a discreet person would exercise over his own affairs. The bank might not be liable for a single act of fraud or crime on the part of an officer or agent, while it would be for a continuous course of fraudulent practice, especially those so openly committed and easily detected as these are shown to have been. Here were no supervision, no meetings, no examination, no inquiry." This case was referred to with approval in *Preston v. Prather*, 137 U. S. 604, 614; 11 Sup. Ct. Rep'r, 162. So in *Hun v. Cary*, 82 N. Y. 65, 71, which involved the question of the degree of diligence to be exercised by directors of a savings bank, Judge Earl, speaking for the whole court, said: "Few persons would be willing to deposit money in savings banks, or to take stock in corporations, with the understanding that the trustees or directors were bound only to exercise slight care, such as inattentive persons would give to their own business, in the management of the large and important interests committed to their hands. When one deposits money in a savings bank, or takes stock in a corporation, thus divesting himself of the immediate control of his property, he expects, and has the right to expect, that the trustees or directors, who are chosen to take his place in the management and control of his property, will exercise ordin-

ary care and prudence in the trusts committed to them — the same degree of care and prudence that men prompted by self-interest generally exercise in their own affairs. When one voluntarily takes the position of trustee or director of a corporation, good faith, exact justice and public policy unite in requiring of him such degree of care and prudence and it is a gross breach of duty — *crassa negligentia* — not to bestow them.” *Ackerman v. Halsey*, 37 N. J. Eq. 356, 361; 38 N. J. Eq. 501, 510; *Society v. Underwood*, 9 Bush, 609, 621; *Mining Co. v. Ryan*, 42 Minn. 196; 44 N. W. Rep’r, 56; *U. S. v. Means*, 42 Fed. Rep’r, 599, 603; *Delano v. Case*, 121 Ill. 247, 249; 12 N. E. Rep’r, 676; *Percy v. Millaudon*, 3 La. 568, 591; *Marshall v. Bank*, 85 Va. 676, 684; 8 S. E. Rep’r, 586; and *Bank v. Bosseix*, 3 Fed. Rep’r, 817.

The case of *Charitable Corp. v. Sutton*, 2 Atk. 400, 405, 406, which involved questions of the liability of directors of a corporation for alleged breaches of trust, fraud and mismanagement, is very instructive upon this general subject. Among the objects of the corporation was the lending of money upon pledges, etc., and banking with notes payable on demand within the amount of its stock. One of the breaches of duty complained of was non-attendance by committeemen or directors upon their employment. While conceding that the employment was not one affecting the government, Lord Chancellor Hardwicke said: “I take the employment of a director to be of a mixed nature. It partakes of the nature of a public office, as it arises from the charter of the crown. * * * Therefore, committeemen are most properly agents to those who employ them in this trust and who empower them to direct and superintend the affairs of the corporation. In this respect they may be guilty of acts of commission or omission, of malfeasance or non-feasance.” Referring to malfeasance or non-feasance upon the part of directors, he said: “To instance, in non-attendance, if some persons are guilty of gross non-attendance and leave the management entirely to others, they may be guilty by this means of the breaches of trust that are committed by others. By accepting a trust of this sort, a person is obliged to execute it with fidelity and reasonable diligence; and it is no excuse to say that they had no benefit from it, but that it was merely honorary; and, therefore, they are within the case of

common trustees. Another objection has been made that the court can make no decree upon these persons which will be just, for it is said every man's non-attendance or omission of his duty is his own default and that each particular person must bear just such a proportion as is suitable to the loss arising from his particular neglect, which makes it a case out of the power of the court. Now, if this doctrine should prevail, it is indeed laying the axe to the root of the tree. But if, upon inquiry before the master, there should appear to be a supine negligence in all of them, by which a gross complicated loss happens, I will never determine they are not all guilty. Nor will I ever determine that a court of equity cannot lay hold of every breach of trust, let the person be guilty of it either in a private or public capacity." So, in *Land Credit Co. v. Lord Fermoy*, L. R., 5 Ch. 763, 770, Lord Hatherley said: "I am exceedingly reluctant in any way to exonerate directors from performing their duty, and I quite agree that it is their duty to be awake, and that their being asleep would not exempt them from the consequences of not attending to the business of the company."

The observations of Lord Chancellors Hardwicke and Hatherley were referred to with approval by the court of errors and appeals of New Jersey in *Williams v. McKay*, 40 N. J. Eq. 189, 201, where Chief Justice Beasley, speaking for the court, said: "I entirely repudiate the notion that this board of managers could leave the entire affairs of this bank to certain committeemen, and then, when disaster to the innocent and helpless *cestuis que trustent* ensued, stifle all complaints of their neglects by saying, 'We did not do these things, and we know nothing about them.'"

* * * The misconduct in question was manifested in frequent, glaring instances; and it is not easy to imagine how they, or some of them, failed to be discovered by these boards of managers, on the supposition which, in their favor, the law will make, that they exercised their office in this respect with a reasonable degree of vigilance. The neglectful acts in question cannot be regarded by the court as isolated instances, for they run through the whole period of the life of the institution and thus evince a systematic and habitual disregard of the directions of the company's charter, and a very striking indifference to the security of the money held in trust by them."

These salutary doctrines, if applied to the present case — as, in our judgment, they ought to be — require a reversal, with directions that a decree be entered adjudging Elbridge G. Spaulding, Francis E. Coit's estate and W. H. Johnson liable for such losses occurring during the period in question as could have been avoided by the exercise of reasonable diligence upon the part of said Coit, Johnson and Spaulding, respectively, in performing the duties appertaining to them as directors. The case is one of supine, continuous negligence upon the part of the three directors named, in the discharge of duties they owed to the bank and to those interested in it. No usage of a national bank, nor any authority to carry on its business through executive officers and agents, will relieve its directors from the duty imposed upon them by law of diligently managing and diligently administering its affairs, and actively supervising the conduct of its officers and agents. There was here no diligence, no supervision, but absolute inaction in respect to the affairs of the bank.

It was said at the bar that if such a rule be rigidly applied, a gentleman of property and means would hesitate long before accepting the position of director in a banking association. This could not be the result if gentlemen of that class, becoming directors of such institutions, would exercise any thing like the care and supervision they or any other prudent, discreet persons give to the management of their own business. They ought not, by accepting and holding the position of directors, give assurance to stockholders and depositors, whose interests have been committed to their control, that the bank is being safely and honestly managed, without doing what prudent men of business recognize as essential to make such an assurance of value. A banking corporation, publicly avowing that its business was to be wholly administered by executive officers, and that the directors would have nothing in fact to do with its management, would not long retain the confidence of stockholders and depositors; a fact which of itself shows that the abdication by directors of their duties and functions not only tends to defeat the object for the creation of such an institution, but puts in peril the interests of stockholders and depositors.*

* Reported in 11 Sup. Ct. Rep'r, 224; 141 U. S. 122.

Liability of directors for negligence or misfeasance in office.—See generally, *Metropolitan R. Co. v. Kneeland*, 2 Am. R. R. & Corp. Rep. 502; *Windham v. French*, 8 Am. R. R. & Corp. Rep. 197; *Huntington v. Attrill*, 1 Am. R. R. & Corp. Rep. 418.

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Containing references to both the reported cases and the notes.

ACT OF GOD.

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ACTION.

1. *Whether condemnation proceeding an "action" within statute as to costs.* A proceeding by a railroad company to condemn lands is not an "action" within the meaning of the Revised Statutes of Wisconsin 1878, chapter 129, awarding costs to a party to an "action," and the land-owner, therefore, who successfully resists such proceeding, is not entitled to costs for his expenses in defending it. *Wisconsin Central R. Co. v. Kneale (Wis.), 122.*

AGENTS.

See BANKS; DIRECTORS; INSURANCE; STOCK AND STOCKHOLDERS.

ASSIGNMENT.

See INSURANCE, 1, 3, 8.

BAGGAGE.

1. *Liability of carrier for loss of baggage.* *Oakes v. Northern Pac. R. Co. (Ore.) 571*

See CARRIERS, 1, 5.

BANKS AND BANKING.

CHECKS.

1. *Liability of bank to depositor for money paid out upon checks with forged indorsements.* A bank is liable to its depositors for money deposited which it has paid out on checks drawn by the depositor, which checks have been stolen by the depositor's clerk, who has forged the indorsement thereon, where it appears that the depositor was guilty of no negligence in the matter, and that the bank paid the checks without inquiry as to the genuineness of the indorsements and in reliance upon the responsibility of the persons presenting them for payment. *Shipman et al. v. Bank of State of New York (N. Y.), 608.*

2. *Effect of return of checks to depositor with pass-book written up.* The fact that such checks were returned to the depositor when his pass-book was written up, and were received by him without objection, does not relieve the bank from liability where the failure of the depositor to detect the forgeries was not caused by negligence on his part. *Ibid.*

BANKS AND BANKING — CHECKS — *Continued.*

3. *Checks payable to fictitious payee—construction of New York statute.* 1 Revised Statutes of New York, page 768, section 5, which provides that negotiable paper made payable to a fictitious person, and negotiated by the maker, has the same validity, "as against the maker and all persons having knowledge of the facts, as if payable to bearer," does not apply where the maker believes the payee of a check drawn by him to be a real person, and does not intend to have the check go into circulation until it has been indorsed by the payee, but the check is fraudulently negotiated by a third person without fault of the maker. *Ibid.*

4. *Bank not discharged because real payees have been reimbursed by forger.* In an action by a depositor against a bank to recover money deposited, which the bank has paid out on checks having forged indorsements, the fact that the forger has made good the amount of the checks to the payees constitutes no defense, where the money with which he made good the checks was not furnished by the bank, and plaintiff had not profited by such payment, since the action is not founded upon the wrongful payment of the checks, but upon the debt created by the deposit. *Ibid.*

5. *Forged check credited by payee bank to another bank which had cashed same—liability of latter bank to former upon discovery of forgery.* Defendant cashed a forged check, purporting to be drawn on plaintiff by one of its customers, without attempting to identify the person presenting it; and afterward the check was allowed defendant as a credit on a settlement between the two banks. The nominal drawer was not a customer of defendant, and the check, which was payable to the payee or bearer, was indorsed by the payee. The check remained with plaintiff over a month before it was discovered to be a forgery, but defendant was notified immediately after the discovery, and the delay worked no prejudice to the defendant. Held, that the defendant was liable for the loss. *First Nat. Bank v. First Nat. Bank (Mass.)*, 621, n.

6. *Payment upon forged indorsement—liability of drawee to real payee.* After a bank-draft which had been paid to one who held it under a forged indorsement was returned to the drawee, the latter redelivered it to the payee, who demanded payment, which was refused, whereupon the drawer paid the draft after protest. Held, that the drawer had a right of action against the drawee for its refusal of payment. *Citizens' Nat. Bank v. Importers & Traders' Nat. Bank (N. Y.)*, 622, n.

7. *Receiving forged check upon deposit—liability for loss as between bank and depositor.* A depositor brought to his bank a check which the cashier, simply from its amount, and not from any appearance of fraud, advised him not to take, as it might be raised, but said it could be deposited for collection, and, if it was not returned, they would suppose it all right. It was left and credited to the depositor, who, two days later, without making further inquiry, completed the sale in which it was offered in payment. The bank's correspondent credited it with the check, but about a month later it was returned by the bank on which it was drawn as being raised, and the correspondent charged it up to the depositor's bank, which charged it to the depositor. Held, that the depositor could not recover the amount of the bank, on the ground of negligence or because of the credit to his account. *Rapp v. National Security Bank (Penn.)*, 622, n.

BANKS AND BANKING — CHECKS — *Continued.*

8. *Payment of forged check by bank — liability to depositor.* Where a bank pays money of a depositor to one who has forged his name, the bank knowing that such depositor cannot write, it is liable to him for the money so paid, though it relied on the forger's statement that he had authority to sign the depositor's name. *Georgia R. & Banking Co. v. Love & Good-will Society* (Ga.), 622, n.

DIRECTORS AND OFFICERS.

9. *General duty and liability of bank directors.* Directors must exercise ordinary care and prudence in the administration of the affairs of a bank, and this includes something more than officiation as figure-heads. They are entitled under the law to commit the banking business, as defined, to their duly authorized officers, but this does not absolve them from the duty of reasonable supervision, nor ought they to be permitted to be shielded from liability because of want of knowledge of wrong-doing, if that ignorance is the result of gross inattention. *Briggs v. Spaulding* (U. S.), 712.

10. *When directors not liable for losses which investigation might have prevented.* Where the affairs of a bank are managed by its president, who has the reputation of being trustworthy and efficient, and who owns two-thirds of its stock, and the bank is generally considered to be in a prosperous condition, directors cannot be held liable for losses through mismanagement on the ground of negligence, in that they did not, within ninety days after they became directors, compel the board of directors to make a thorough investigation of the books and condition of the bank or make such investigation themselves. *Ibid.*

11. *Officer of bank absent on leave — liability for mismanagement during his absence.* The president and director of a national bank, who is absent on account of ill-health, under a leave of absence granted by the board of directors, cannot be held liable for losses occurring through the negligent management of the bank during his absence. *Ibid.*

NATIONAL BANKS.

12. *Resignation of director of national bank — statute construed.* Revised Statutes of the United States, section 5145, providing that directors of national banks shall hold office for one year, and until their successors have been elected and qualified, does not prohibit resignations within the year. *Ibid.*

13. *Method of effecting resignation — oral resignation.* Since the national banking law is silent as to the time when, and method by which a director may resign, the common law governs, and where a director verbally resigns to the president, to whom he at the same time sells his stock, giving a power of attorney to transfer it on the books of the bank, which is done, the resignation is effective to release the director from responsibility for the subsequent conduct of the bank's affairs. *Ibid.*

SAVINGS BANKS.

14. *Depositors' assent to by-laws.* Though the by-laws of a savings bank require that depositors shall subscribe their names in a book, and thereby be considered as assenting to all the by-laws, such assent may be implied, and will be where a depositor living at a distance, and receiving a deposit-book by mail, with the by-laws printed in it, leaves the deposit, and keeps the book

BANKS AND BANKING — SAVINGS BANKS — *Continued*

for several years, without going to the bank and leaving his signature. *Gifford v. Rutland Savings Bank (Vt.)*, 19.

15. *Payment to wrong person — liability.* The brother of a depositor in defendant bank, neither of whom was known to the bank officers, presented the deposit-book, which he had stolen, for payment, representing himself as the owner, and, when asked how the deposit had been made, he correctly replied that it was by letter from a third person. In signing the name he formed an initial so obscurely that it caused comment from the president. Notice of the loss of the book, required by the by-laws to be given defendant, as a guard against a wrong payment, and as a prerequisite for defendant's liability therefor, was not given. Held, that defendant used reasonable care in making payment, and was not liable. *Ibid.*

16. *Pass-book — whether plaintiff a bona fide holder of.* A stranger, H., presented for deposit at defendant savings bank in Connecticut a check on another bank, and received two pass-books, a portion of the amount being entered in each. The check proved to be fraudulent, and the bank published notice thereof. Afterward H. presented one of the books to plaintiff in Dublin, requesting a loan thereon. Plaintiff declined, but afterward gave to a bank there his draft, accepted by H., and indorsed by himself. The bank discounted the draft for H., and took the book, with his order for collection. On learning that the book was obtained by fraud, the bank returned it to plaintiff, who paid the draft. Held, that plaintiff was guilty of negligence, and was not a *bona fide* holder of the book. *McCaskill v. Conn. Sav. Bank (Conn.)*, 23, n.

17. *Pass-book not negotiable.* Such pass-book, issued by a savings bank, was not a negotiable instrument, nor was it rendered such by an order, signed by the pretended depositor, directing payment to a third person. *Ibid.*

18. *Entries in, when not an estoppel upon the bank.* The entry in the pass-book, procured through fraud, and made by the bank without knowledge of the truth, or intention that the representation should be acted on, did not create an estoppel. *Ibid.*

19. *Pass-book not conclusive as to ownership of deposit.* Though deposits in a savings bank are made in the name of the wife, it is competent to show by parol evidence that the real ownership was in the husband. *Kennebec Savings Bank v. Fogg (Me.)*, 24, n.

20. When a bank deposit-book designates the depositor as trustee for another, the book is not conclusive evidence of the trust. *Parkman v. Suffolk Savings Bank (Mass.)*, 24, n.

21. In an action for moneys deposited with defendant bank, it appeared that the deposits stood in the name of plaintiff, and that a deposit-book had been issued in her name. She testified that some of the deposits were of her money, and that other deposits were of money given her by her father. The latter had possession of the bank book, and drew on her account, but there was evidence that plaintiff had no knowledge of payments to the father. Held, that the question as to the ownership by plaintiff of such deposits should have been left to the jury. *Dickinson v. Leominster Savings Bank (Mass.)*, 24, n.

22. *Negotiability of orders upon savings banks.* An order on a savings bank bore upon its face memoranda showing that it was drawn on a specially deposited fund held by the bank subject to certain rules and regulations in force be-

BANKS AND BANKING — SAVINGS BANKS — *Continued.*

tween it and the depositor, requiring previous notice of depositor's intention to draw upon the fund, return of the notice ticket, with the order to pay, and presentation of the deposit-book, before payment could be required. Held, that the order was non-negotiable. *Iron City National Bank v. McCord* (Penn.), 24, n.

BENEFITS.

See EMINENT DOMAIN.

BONDS

1. *Constitutional provision forbidding the issue of railroad aid bonds except where authorized under existing laws before adoption of constitution.* The Illinois constitution of 1870 forbade the issuance of railroad aid bonds, except where they had been authorized before its adoption, by a vote of the people under existing laws. Held, where such bonds were authorized at an election irregularly held, a ratification of such election by the legislature before the adoption of the constitution does not validate the bonds, issued after the constitution was adopted, since the "existing laws" referred to in the constitution are the laws in force when the election was held. *Williams v. People, ex rel.*, etc. (Ill.), 820, n.

2. Bonds issued pursuant to a vote taken after the adoption of the constitution are void. *Casey v. People, ex rel. Patton* (Ill.), 820, n.

3. *Constitutional provision forbidding municipal aid to any corporation — effect upon bonds placed in escrow before its adoption.* The constitution of New York, article 8, section 11, which prohibits counties, cities, towns and villages from loaning money or credit to aid any corporation, did not affect a valid and binding contract made before its adoption, by which a town had deposited its bonds in escrow, to be delivered to a railroad company on the completion of a road, and on the faith of which the company was building the road. *Cherry Creek v. Becker* (N. Y.), 820, n.

4. *Constitutional provision limiting amount of issue — rights of holders where limit exceeded.* By the constitution of Texas, article 8, section 9, and article 11, sections 4, 5 and 7, the power of a city of one thousand inhabitants or less, to create debts is limited to a sum, the interest and two per cent of the principal of which can be paid out of a levy of twenty-five cents on each \$100 of the last assessment of the property for taxes — held, that purchasers of bonds issued by the city must take notice of the assessment for taxes, and no recital in the bonds can estop the city from denying the validity of bonds issued in excess of the amounts authorized. *Citizens' Bank v. City of Terrell* (Tex.), 820, n.

5. If the bonds issued were delivered at different dates, those first delivered up to the amount of the debt the city could lawfully create should be paid, and the others should be treated as nullities; but if the bonds were delivered at the same time, so that none has priority over the others, the amount of the valid debt should be distributed equally between the bonds. *Ibid.*

6. *Bonding constitution — municipality constructing road to be operated by private corporation.* Laws Ohio 1880, page 157, which authorize a certain township to construct a few miles of railroad within its limits, intended to ultimately form part of a continuous line of road to be operated and equipped

BONDS — *Continued.*

by private capital, violates constitution Ohio, article 8, section 8, which prohibits the general assembly from authorizing any county, city, town or township to become a stockholder in any private corporation, or to raise money for or loan its credit to or in aid of such corporation, and bonds issued under the act are void. *Pleasant Township v. Aetna Life Ins. Co. (U. S.), 321, n.*

7. *Right of tax-payer to question validity of bonds — effect of laches.* The statute of limitations does not run against the right of a tax-payer to contest, by equitable proceeding, the validity of the election by which it was determined to issue township bonds in aid of a railroad, but such action must be brought within a reasonable time after the election, and before the rights of third persons have accrued under the action of the authorities who have issued the bonds in accordance with the result of the election, and where the action is delayed for three years after the election and issuance of the bonds, plaintiffs are not entitled to relief by injunction to restrain the commissioners from collecting the taxes to pay the interest on the bonds as provided in the law authorizing the election. *Jones v. Comrs. of Person (N. C.), 321, n.*

8. *Long acquiescence of municipality — effect upon equitable remedy.* Where a town has issued bonds and has paid interest upon them for six years without questioning their validity, a court of equity will not, at the town's instance, cancel them in the hands of an innocent purchaser for value, even though they are actually invalid. *Cherry Creek v. Becker (N. Y.), 321, n.*

9. *Enjoining issue — irregular election.* In an action to enjoin the issuing of certain bonds of a city to be donated to a railway company upon the completion of its road, it appeared that the whole question had not been submitted to the electors of the city, and that no vote had been submitted or adopted for the payment of the principal at any time. Held, that the injunction granted by the court below would be affirmed. *Cook v. City of Beatrice (Neb.), 321, n.*

10. *Distinction between suit to enjoin issue and one to resist payment.* A much stronger case is required to enjoin the collection of taxes levied for the payment of interest or principal of bonds issued in pursuance of apparent authority, and which have been duly registered and passed into the hands of bona fide purchasers, than to prevent the issuing of such bonds upon specified grounds, which might invalidate them. *Ibid.*

11. *Bonds dependent upon condition to build road — what amounts to performance — obtaining use of another's tracks.* Where the issuing of township bonds or warrants to a railroad company is dependent upon the condition that the company shall build or cause to be built and have in operation, with cars running thereon, by lease or otherwise, its railroad from a certain city therein named, at or near the depot of another railroad company in the city, held, that the building of its road within one hundred and eleven and one-half feet of the limits of the city, and an arrangement by it with the other railroad company, whose road it intersects at that point, for the running of its trains over the road from its intersection to its depot within the city, and the operation of the road from the depot in the city, over its entire line, will be regarded as a substantial compliance with the condition. *Chicago, etc., R. Co. v. Makepeace (Kans.), 321, n.*

12. *Recitals in bonds — effect of.* A recital in bonds of a village, which were in fact issued in violation of law, over the signature of the clerk and

BONDS — *Continued.*

president of the village, that they were "issued in conformity with the general laws of the state, * * * and authorized by the board of trustees," raises no conclusive presumption of the existence of precedent conditions, and affords no protection to the holder as a *bona fide* purchaser for value. *Spitzer v. Village of Blanchard* (Mich.), 822, n.

13. *Bonds authorized on recommendation of grand jury — discretion to be exercised.* Act Pennsylvania May 4, 1852, a supplement to an act incorporating the Pittsburgh and Erie Railroad Company, provides that subscriptions to the stock of said railroad company by defendant and other counties "shall be made by the county commissioners after, and not before, the amount of such subscriptions shall have been designated, advised and recommended by the grand jury." Held, that bonds of the county given for stock subscribed for by the commissioners, on the recommendation only of the grand jury that they subscribe for an amount not exceeding \$150,000, were illegal, as all discretionary power was vested in the grand jury by said act. *Frick v. Mercer County* (Penn.), 822, n.

14. *Interest on overdue coupons — liability of municipality.* Where bonds were issued under a special statute which provided for the payment of the principal and annual interest, and nothing more, and which created a specific fund for the payment of the bonds, the city, on the insufficiency of the fund for any one year to meet the annual interest, does not become liable to pay interest on overdue coupons, under the general statute providing for interest on all contracts after maturity. *Bates v. Gerber* (Cal.), 822, n.

15. *Election — effect of submitting additional questions not authorized.* Where an election is called for the purpose of voting on a proposition to issue bonds in aid of a certain railroad, the submission to the voters at the same election of a proposition to aid any railroad that may be built between two certain points within the next five years, though improper, does not invalidate bonds issued to the first-named railroad in pursuance of such election, after such bonds have passed into the hands of innocent purchasers. *Williams v. People, ex rel., etc.* (Ill.), 822, n.

16. *Election — notice.* Where the notice, required by statute, of an election for the issue of bonds is not given, the election will confer no authority to issue the bonds, and the fact that there was not time to give the requisite notice between the order calling the election and the date of the election is sufficient evidence that legal notice was not given. *Ibid.*

17. *Bonds issued upon conditions not mentioned in statute.* Where a town is authorized to subscribe for railroad stock, and to issue bonds in payment therefor, the fact that such bonds are issued upon condition that the road should build its shops in that town does not invalidate the bonds, since the imposing of such condition does not change the object for which the bonds were issued. *Casey v. People, ex rel., etc.* (Ill.), 823, n.

18. *Bonds issued by county irregularly organized.* Though the organization of a county was confessedly fraudulent, where it was afterward recognized as valid by the legislature, it is binding, and bonds of such county which are regular on their face are valid obligations in the hands of *bona fide* purchasers before maturity. *Harper County v. Rose* (U. S.), 823, n.

BONDS — *Continued.*

19. *Where regularity of steps are determined by county judge before issue—effect of judgment.* Where, under Laws New York 1869, chapter 907, as amended by Laws 1871, chapter 925, a county judge determined that petitions presented for the issuance of bonds to aid in the construction of a railroad were signed by a majority of the tax-payers of the town, who represented a majority of its taxable property, the regularity of the steps prior to such determination cannot be questioned, except by direct proceedings to review his judgment. *Cherry Creek v. Becker* (N. Y.), 323, n.

20. *Taxation to pay interest—statutes construed.* Laws Missouri 1851, pages 483, 486, authorizing counties to subscribe to the stock of a certain railroad provide that the county may issue bonds "to raise funds to pay the stock thus subscribed, and to take proper steps to protect the interest and credit of the county." Held, that this confers authority to levy a tax sufficient to pay the interest on such bonds, though the general laws restrict the tax rate "for county purposes" to one-half of one per cent. *Scotland County v. United States, ex rel., etc.* (U. S.), 323, n.

21. *Power of municipal corporation to issue and sell negotiable bonds.* Though a municipal corporation may have power, either express or implied, to issue evidences of debt for money borrowed or debts existing, it cannot without express legislative authority issue and sell in the open market negotiable bonds for the purpose of raising money with which to fund its indebtedness. *Merrill v. Town of Monticello* (U. S.), 301.

22. *Negotiable paper so issued without express authority is not rendered valid because issued to take up previous paper lawfully issued.* *Ibid.*

23. *Estoppel to deny validity of bonds.* In an action at law on such paper, the corporation is not estopped to set up its invalidity because it has received and used the money for which it was issued. *Ibid.*

BY-LAWS.

See BANKS AND BANKING, 14.

CARRIERS.

BAGGAGE.

1. *Loss of baggage—liability.* Carriers of passengers are responsible for the carriage and safe delivery of such baggage as, by custom and usage, is ordinarily carried by travelers; and the payment of the usual fare includes, in legal contemplation, a compensation for the conveyance of such baggage. *Oakes v. Northern Pac. R. Co.* (Ore.), 571.

2. *Degree of liability for baggage.* They are insurers of such baggage in the same manner and to the same extent as for goods or freight. *Ibid.*

3. *Baggage defined.* Baggage, within the rule of such liability, is confined to such articles as are usually carried as baggage, for the personal use of the passenger, or for his convenience, instruction or amusement on the journey, and does not include that which is carried for the purposes of business, such as merchandise or the like. *Ibid.*

4. *Liability for merchandise when knowingly received as baggage.* While the obligation of a carrier of passengers is limited to ordinary baggage, yet if the carrier knowingly permit a passenger, either on payment or without payment of an extra charge, to take articles as personal baggage which are not properly

CARRIERS — BAGGAGE — *Continued.*

such, it will be liable for their loss or destruction though without fault. *Ibid.*

CONNECTING LINES.

5. *Liability for lost baggage.* In a joint action against three railroad companies, operating connecting lines, to recover for baggage lost at some unknown point on their lines, the evidence showed that plaintiff purchased for a single fare from another company, a common agent of defendants, a through ticket over its own and defendants' lines, with coupons attached, on each of which were the initials of all of defendants; that when plaintiff reached the end of the line of the initial company, which had expressly limited its liability to such injuries as might occur to plaintiff's baggage while on its own line, she received from the next company, a through check for her baggage over all of defendants' lines, and was charged for extra weight; that the baggage was carried through to the end of the journey on the same train with plaintiff. Held, that the evidence was sufficient to authorize a finding that defendants jointly undertook to carry the baggage safely through to the end of the journey. *Peterson v. Chicago, etc., R. Co. (Iowa), 578, n.*

6. *Through contract — evidence.* Where a railroad company receives freight to be forwarded to a point not on its line, the fact that it requires from the shipper a guaranty of payment of through freight is not conclusive that it undertakes the responsibility of delivering the goods at the point of destination. *Illinois Central R. Co. v. Kerr (Miss.), 584, n.*

7. *Last carrier — duties and liabilities.* Where the last carrier is not a party to any special contract for the entire transit, it is not liable for loss or damage to the goods before they were received by it. *East Tenn., etc., R. Co. v. Johnson (Ga.), 584, n.*

8. Nor is it bound by a contract for special rates made by the initial carrier of which it has no notice. *Georgia R. Co. v. Murray (Ga.), 585, n.*

9. *Initial carrier — liability.* In an action for failure to deliver goods at their destination on a connecting line, for which goods defendant railroad company issued a bill of lading, limiting its liability to damages occurring while the goods were under its control, it is proper to refuse to direct a verdict for defendant where the evidence fails to show that the goods were delivered safely to the connecting line. *Georgia Pac. Ry. Co. v. Hughout (Ala.), 585, n.*

10. *Limiting liability.* Where a ticket is sold by a railroad company for a continuous passage over its own line, and thence over the lines of other companies, to the destination, the initial company may, by a stipulation in the contract of carriage, limit its liability for injury to baggage to such injury as may occur on its own line. *Peterson v. Chicago, etc., R. Co. (Iowa), 579, n.*

DISCRIMINATION.

11. *Contract with favored shipper for rebates — validity.* A contract by which a railroad company, before the passage of the interstate commerce act, discriminates by agreeing to allow a certain shipper a rebate on freight charges, is not valid and enforceable at common law, and is not such a contract as could be impaired by the interstate commerce act prohibiting such discrimination. *Fitzgerald et al. v. Grand Trunk R. Co. (Vt.), 561.*

CARRIERS — *Continued.***EJECTING PASSENGER.**

12. *Refusing going coupon for return trip — ejection.* Where the conductor of a railroad train returns to a passenger the wrong portion of a return-trip ticket, and another conductor on the return trip refuses to accept it after the mistake is explained to him, and ejects the passenger from the train, the railroad company is liable. *Kansas City, M. & B. R. Co. v. Riley* (Miss.), 654.

13. *Tender of fare after expulsion commenced.* Where a passenger has refused to pay the fare which the company had a right to demand he cannot, after the company has taken steps for his expulsion by stopping the train or seizing his person, make a tender of the fare and thereby impose upon the company the obligation of carrying him. *Atchison, etc., R. Co. v. Dwelle* (Kans.), 658, n.

14. *Failure to procure ticket.* Under the statutes of Texas requiring railroads to receive passengers and maintain a depot at intersections with other railroads and requiring ticket-offices to be kept open for half an hour prior to the departure of trains, a company is liable for the ejection of a passenger from a freight train, who gets on at a junction where there is no ticket-office, notwithstanding its rule that passengers without tickets cannot ride on such trains. *Eddy v. Rider* (Tex.), 658, n.

15. *Right to use ticket issued to partnership.* When a person claiming the right to travel on a train of a railroad company as a passenger holding a commutation ticket issued by the agent of the company, on the alleged ground that he is one of the members of the partnership named on the face of the ticket, held, that he must show the conductor that his name appears indorsed thereon, in compliance with the conditions specified in the contract on the reverse of the ticket, and in a suit for expulsion consequent upon a rejection of the ticket and refusal to pay fare, the plaintiff must show that there was such a partnership as claimed, and that he was one of members. *Granier v. Louisiana W. R. Co.* (La.), 658, n.

16. *Ejection for refusal to pay fare after having given up ticket — damages.* A boy of sixteen became a passenger on defendant's train and gave the conductor his ticket. The conductor afterward demanded his fare again and refused to believe the boy's assertion that he had given him a ticket; whereupon the boy gave the conductor ten cents, which was all the money he had, but the conductor ordered him to leave the train at a station short of his destination, whereby he was compelled to walk the rest of the way. Held, that judgment for \$195 was not excessive. *Indianapolis, etc., R. Co. v. Howerton* (Ind.), 658, n.

17. *Damages for threatened expulsion and extortion of additional fare.* Where plaintiff had given a ticket for his passage, and the conductor afterward demanded fare for the trip, and threatened to expel him if he did not pay, and charged him with trying to beat his passage, and plaintiff paid the fare demanded it was held that he was entitled to recover the additional fare and damages for the humiliation suffered and the indignity done him. *Pennsylvania Co. v. Bray* (Ind.), 658, n.

18. *Wrongful refusal of ticket — threatened expulsion — damages.* When a conductor wrongfully refused a ticket and threatened expulsion unless fare was paid, and the passenger complied, it was held that nothing could be re-

CARRIERS—EJECTING PASSENGER — *Continued.*

covered for the humiliation and annoyance of having to borrow money to pay his fare or of being subjected to comments by his fellow-passengers. *Hoffman v. Northern Pac. R. Co.* (Minn.), 659, n.

19. *Exemplary damages for expulsion.* A passenger is not entitled to exemplary damages for an unlawful ejection from a railroad train, accomplished without undue force, or unnecessary harshness and unaccompanied by insult, malice or willful wrong. *Tomlinson v. Wilmington, etc., R. Co.* (N. C.), 659, n.

20. *Damages too remote — loss of job by delay.* In an action for wrongful expulsion, damages resulting to the plaintiff from the loss of a job of work, occasioned by his delay at the station at which he was obliged to leave the train, held too remote to be considered. *Corsten v. Northern Pac. R. Co.* (Minn.), 659, n.

21. *Extra fare regulation.* Before a railroad company can collect excess fare from a passenger who has not purchased a ticket, under the provisions of chapter 139 of the Laws of 1886, it must have a ticket-office open for the sale of tickets at the station where passage is taken at least thirty minutes prior to the departure of the train. A keeping of the office open for thirty minutes prior to the advertised time of departure will not suffice where the train is behind time. If the office is not open, with an agent in the same, ready upon call to sell tickets, long enough before the actual departure of the train, whether delayed or not, to enable passengers to purchase tickets and safely board the train, no excess fare can be collected. *Atchison, etc., R. Co. v. Dwell* (Kans.), 657, n.

INJURY TO PASSENGERS — NEGLIGENCE.

22. *Derailment — presumption of negligence.* Where a passenger brings an action to recover for injuries resulting from the derailment of the train on which he was riding, and therein shows the occurrence of the accident and the extent of his injuries, a *prima facie* case is made out in his favor, and the burden is thrown upon the railway company to show that the injury did not result from a want of care upon its part. *Southern Kans. Ry. Co. v. Walsh* (Kans.), 281.

23. The *prima facie* case thus made out may be overthrown by showing that the injury resulted from inevitable accident, or something against which no human prudence or foresight on the part of the company could provide. *Ibid.*

24. *Degree of care to be exercised for the safety of passengers.* The railway company owes a higher duty to its passengers than mere ordinary care and foresight in the construction and maintenance of its tracks. It is bound to exercise the highest degree of practicable care; not the utmost possible precaution that might be imagined, but the highest care and best precaution known to practical use, and which are consistent with the mode of transportation adopted. *Ibid.*

25. *When accident is prima facie evidence of negligence.* In an action against a railroad company for injuries to a passenger where an instruction is given for defendant that the burden of proof is on plaintiff to show negligence from which his injury resulted, it is error to refuse to modify the instruction by adding that the injury itself, if plaintiff was in the exercise of ordinary care, is *prima facie* evidence of negligence. *Gleeson v. Virginia Midland R. Co.* (U. S.), 398.

CARRIERS — INJURY TO PASSENGERS — NEGLIGENCE — *Continued.*

26. *Landslide in deep cut — act of God — negligence.* A land-slide in a railway cut, which results from the loosening of the earth in its sides by a fall of rain which is not of unusual violence, is not such an occurrence as is embraced in the phrase "act of God." *Ibid.*

27. A railroad company which maintains a cut with sides in such a condition that a land-slide of this character occurs therein is guilty of negligence, though the immediate cause of the action was vibration produced by a train passing through the cut. *Ibid.*

28. *Derailment of car — presumption of negligence.* Negligence may be presumed from the derailment of the car in which a passenger is riding. 238, n.

29. *Derailment by collision with calf on track — neglect to fence.* Where the derailment was caused by a collision with a calf on the track, which could have been seen six hundred feet in advance of the train, and the railroad company failed to fence its track, having that right, it is sufficient to show negligence. *Gulf, etc., R. Co. v. Wilson (Tex.)* 238, n.

30. *Derailment while rounding curve — unusual speed.* In an action against a railroad company for injuries to a passenger, occasioned by a train running off the track, evidence that at the time the accident occurred the train was running down a steep incline on a new and curved track, at an unusual and dangerous rate of speed, is sufficient to cast on defendant the burden of showing that the accident was not caused by any want of care on its part. *Mitchell v. Southern Pac. R. Co. (Cal.)*, 239, n.

31. *Breaking of wheel — derailment — the question of negligence.* The plaintiff was injured by the derailment of the car in which she was riding. The trial court found as follows: "The cause of the accident was the breaking of a wheel at a point about one hundred and thirty-five miles from New Orleans. It had been carefully inspected at La Fayette, and showed no patent defects. The track was in good order. The train was properly equipped. The train was not running at an unusual rate of speed. The wheel accidentally broke from some hidden defects or cause which human care and foresight could not prevent." It also appeared that shortly before the accident a passenger on the car informed the conductor that he had heard a loud noise and felt a jolt. The conductor at once inspected the car as well as he could both inside and out and perceived no cause for alarm. Held, that the conductor was not negligent in not stopping the car to inspect it further, and judgment was ordered for the defendant. *Frelson v. Southern Pac. R. Co. (La.)*, 239, n.

32. *Collision with caboose detached from freight train.* While a freight train was going up a steep grade on a curved track, the caboose became detached, and running backward collided with the engine of a train following eight minutes behind the first. In a suit for an injury to a passenger on the caboose, held sufficient evidence of negligence. *Louisville, etc., R. Co. v. Taylor (Ind.)*, 239, n.

33. *Defective culvert — washout from breaking of dam — liability.* In an action against a railroad company for injuries to a passenger occasioned by a washout at a culvert, the fact that the culvert would not have given way but for the breaking of a dam on adjoining property over which the company had no control, will not prevent recovery, if the negligent manner in which the

CARRIERS — INJURY TO PASSENGERS — NEGLIGENCE — *Continued.*

culvert was construed contributed to the accident. *Bonner v. Wingate* (Tex.), 406, n.

84. *Washout from rain-fall — liability.* Where a break in the track resulted from a flow of water in a rain-storm, it was held that a verdict for the plaintiff would not be disturbed when the evidence was conflicting as to whether the rainfall was unusually great. *Texas, etc., R. Co. v. Barron* (Tex.), 406, n.

85. *Contributory negligence — riding on platform of street-car.* It is not negligence *per se* to ride on the platform of a street-car, though there is room within; and an instruction that this fact will prevent a recovery for an injury to a passenger resulting from the negligence of the street-car company is error. *Upham v. Detroit City Ry. Co.* (Mich.), 160.

86. In an action against a street-railway company for personal injuries it appeared that plaintiff, a boy of thirteen, a passenger on a crowded car, sat on the front platform, with his feet on the step, and his knees projecting several inches beyond the side of the car, and was struck on the knees, and knocked under the car, by a mortar-box which builders had placed in the street only a few inches from passing cars. Held, that a compulsory nonsuit was properly ordered because of contributory negligence on the part of plaintiff and absence of negligence on defendant's part. *Butler v. Pittsburgh, etc., R. Co.* (Penn.) 164, n.

87. Plaintiff, a boy fourteen years old, was a passenger on one of defendant's street cars. The car was crowded, and he was standing on the front platform leaning against the dasher. He either fell off, or, as he claimed, was pushed off, by passengers getting off, and was run over. Held, that there was no error in charging that defendant was not liable for the conduct of the passengers unless it was unusual and disorderly, and could have been prevented by the persons who had charge of the car at the time. *Randall v. Frankford, etc., R. Co.* (Penn.), 164, n.

88. Plaintiff, a boy eight years of age, voluntarily, and without the knowledge of the conductor, went to the front platform of a horse-car to join his companion. The conductor opened the wicket in the front door, and asked plaintiff's companion for his fare, and upon the latter stating that he had paid his fare on another car, said he must either pay or get off, and opened the door. As he did so, plaintiff stepped with one foot down on the step of the car, and attempted to get off backward. The driver caught him, and placed him back on the platform, saying: "Don't you get off, you will fall;" but almost immediately, plaintiff repeated the act, and was either thrown off or jumped off backward, and was injured. Held, that there was no evidence of negligence on the part of the company. *Sandford v. Hestonville, etc., R. Co.* (Penn.), 164, n.

89. *Riding or being on the platform of a steam railroad car.* In an action by a passenger for personal injuries, where the evidence shows that plaintiff started into another car to get water while the train was moving slowly, but stopped a minute on the platform to talk, and, just as he was passing on, the coupling-pin broke, and the cars parted, throwing him off, it is error to direct a nonsuit on the ground that plaintiff was not in the exercise of ordinary care. *Cotchett v. Savannah, etc., Ry. Co.* (Ga.), 164, n.

CARRIERS — INJURY TO PASSENGERS — NEGLIGENCE — *Continued.*

40. A passenger on defendant's train found the rear car full, and attempted to pass to the next car. The distance between the platforms of the two cars was about six inches, and there was nothing to prevent her from stepping from one platform to the other; but, without looking, she placed her foot on the buffers just as the train started, and her foot was caught and injured. She had been lame for many years, and had often traveled on this train. The evidence also showed that the train started with a jerk, and did not stop as long as usual at that place, but the train had no fixed time to stay there, or for leaving. Held, that plaintiff was guilty of contributory negligence. *Snowden v. Boston & Me. R. Co. (Mass.)*, 165, n.

41. Where plaintiff went upon the platform of the car as the train was nearing the station, with a view to alighting before the train stopped and was thrown off and injured by the sudden jerking of the train, it was held he was guilty of such contributory negligence as would preclude his recovery. *Patterson v. Central R., etc., Co. (Ga.)*, 165, n.

42. Where plaintiff was on the platform of the car when he was injured, and testifies that he went there because he feared that some accident would result from the unusual speed of the train, and intended in that event to jump into the sand on the side of the road, it is a question for the jury whether his action was that of a person of ordinary care and prudence. *Mitchell v. Southern Pac. R. Co. (Cal.)*, 165, n.

43. Civil Code of California, section 484, absolving railroad companies from responsibility for injuries received by passengers while riding on the platform of a car in violation of the printed and posted regulations of the company, does not apply where the person so injured went upon the platform, in the exercise of ordinary care and prudence, to escape the consequences of an accident which he feared from the unusual speed at which the train was running. *Ibid.*

LIMITING LIABILITY.

44. *Limiting liability to a specified sum.* Where the receipt or contract of a common carrier contains a stipulation that the company is not to be held liable for any loss or damage, except as forwarders only, nor for any loss or damage of any box, package or thing for over \$50, unless the just and true value thereof is stated in such receipt, and where the receipt fails to show any value of the box or goods shipped, the receipt or contract, if fairly and voluntarily entered into, will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, when the loss or injury to the box or goods carried results only from slight, common or ordinary negligence on the part of the carrier, its agents or servants. *Pacific Exp. Co. v. Foley (Kans.)*, 385.

45. *Conflict of laws.* Where goods are delivered to a carrier in Missouri to be transported to a point in Kansas, it will be presumed that the parties contracted with reference to the laws of Missouri and the contract will be interpreted according to the laws of that state. *Ibid.*

46. *Limiting liability — conflict of laws.* Where, in another state, goods are delivered to a common carrier for transportation into Iowa under a contract limiting its liability, valid where made, but void under the laws of Iowa, the contract is valid, and governs the liability of the carrier, though the loss occurs in this state. *Hazel et ux. v. Chicago, M. & St. P. R. Co. (Iowa)*, 429.

CARRIERS — LIMITING LIABILITY — *Continued.*

47. Under Civil Code Dakota, section 1261, providing that the obligations of a common carrier may be limited by special contract, the carrier may by special contract, signed by the consignor, be released from liability except for negligence, and the liability may be limited to \$5 for each hundred-weight of goods. *Ibid.*

48. *Validity of stipulation limiting liability for loss by negligence.* A common carrier cannot limit his liability for loss or damage to goods by reason of his negligence, either as to the right or amount of recovery. 433, n.

49. *Limiting liability of connecting roads as to each other's negligence.* Where a bill of lading, containing a clause limiting the liability of each connecting road to loss or injury suffered while the goods are on its line, is accepted by the shipper, there is a legitimate limitation of liability, which is binding on each of the contracting parties, even though the shipper was unable to read and did not know that the limiting clause was in the bill of lading. *Jones v. Cincinnati, etc., R. Co. (Ala.), 433, n.*

50. *Limitation as to time of presenting claim or commencing suit.* A bill of lading provided that claims for loss or damages must be presented to the delivering line in thirty-six hours after the arrival of the freight. The consignee resided a short distance from the depot, and received the goods Saturday afternoon, but did not open them until Monday morning, having been sick in the interval. Held, that the reasonableness of the stipulation was a question for the jury. *Texas, etc., R. Co., v. Adams (Tex.), 433, n.*

51. In a contract for the transportation of cattle, a common carrier may provide that suit on any claim thereunder must be brought within forty days after the damage occurred, and such a provision will bar an action for delay commenced seventy-seven days after the delivery of the cattle, the carrier having notified the plaintiff twenty-five days after the delivery that his claim would not be paid. *Gulf, etc., R. Co. v. Gateword (Tex.), 433, n.*

52. *Limitation as to liability for delay caused by mobs, strikes, etc.* Where the shipper expressly agrees to assume all risk of delay caused by any mob or strike or threatened violence to person or property, he cannot recover for delay occasioned by a strike and violence of such magnitude as to require the military forces of the government to overcome. *Ibid.*

53. *Validity of limitation as affected by interstate law.* Where cattle were received for transportation from a point in Texas to Chicago, the bill of lading providing that the carrier should be liable only while the cattle were on its own road. The route over that was wholly within the state, and the delay was caused by the refusal of the connecting lines to receive the cattle on account of a strike on their roads. Held, that provisions limiting the time in which suit could be brought, and releasing the carrier from liability for delay caused by strikes, are valid, whether the contract of shipment be considered as interstate or as one to be wholly performed within the state. *Ibid.*

OF FREIGHT.

54. *Loss of goods — prima facie case.* Ownership of property by the plaintiff, its delivery to and acceptance by a common carrier for transportation, and its non delivery to the consignee, are *prima facie* evidence of negligence. The burden then rests upon the carrier to show facts exempting it from liability. *Bennett v. American Express Co. (Me.), 579.*

CARRIERS — OF FREIGHT — *Continued.*

55. *Seizure of goods in transitu by officer without process — liability of carrier.* The property of the plaintiff, while lawfully in the possession of the defendant as a common carrier, was seized unlawfully by an officer, without any warrant or legal process, nor was any afterward obtained. Held, that the officer was a trespasser, and that the common carrier was liable in the same manner as if it had allowed any other trespasser to take the property out of its custody. *Ibid.*

56. *Game laws — construction.* Revised Statutes, chapter 30, section 12, which impose a penalty for killing, destroying or having in possession, during certain portions of the year, 'more than one moose, two caribou or three deer,' does not apply to common carriers in the performance of their duties. *Ibid.*

57. *Receipt by consignee subject to explanation.* A statement in a receipt for goods signed by the consignee that the goods were delivered to him by the carrier in good condition is a mere admission, and is not conclusive. *Missouri Pac. Ry. Co. v. Fennell (Tex.)*, 584, n.

58. *Requiring prepayment of freight — statute construed.* Under the Code of North Carolina, section 1963, providing that common carriers may require prepayment of freight in all cases, a railroad company may lawfully refuse to receive freight offered by another railway company without prepayment, though it does not demand prepayment of others. *Randall v. Richmond, etc., R. Co. (N. C.)*, 584, n.

59. *Delay in transporting — presumption of negligence.* In a suit against a railway company for damages caused to a car-load of onions by delay in transporting them sixty-four miles, the fact that four days were consumed therein was sufficient to justify a finding of negligence, when there was no evidence as to the number of transfers necessary. *St. Clair v. Chicago, etc., R. Co. (Iowa)*, 584, n.

60. It appearing that the onions were in good condition when placed in the car, and by reason of heating were worthless when the car reached its destination, the jury was justified in finding that the damage was caused by the delay. *Ibid.*

61. *Exemption from loss by fire — burden of proof.* Under a bill of lading providing that the carrier shall not be liable for loss or damage by fire the burden of proof is on the carrier not only to show that the cause of loss was within the exception, but also that there was no negligence on its part. *Missouri Pac. Ry. Co. v. China Manuf. Co. (Tex.)*, 585, n.

62. *Damage to goods — prima facie evidence of negligence.* When it is shown that goods were sound and carefully packed when delivered to the carrier, the fact that they arrived in a damaged condition is *prima facie* evidence of negligence. *Phoenix Clay-Pot Works v. Pittsburgh, etc., R. Co. (Penn.)*, 585, n.

63. *Car blown from track — destruction of goods — act of God.* In an action against a railroad company to recover the value of an express package, it appeared that the express-car, with three others, was blown from the track by a gale, into such a position that all the goods must have been thrown into one corner at the top; that the car was immediately set on fire by coals from the stove, and burned so rapidly that the messenger escaped with difficulty; and that the wind was so fierce as to make it almost impossible to stand or walk,

CARRIERS — OF FREIGHT — *Continued.*

and the air so full of dust that one could scarcely see. Held sufficient evidence to support a finding that the proximate cause was the "act of God," and not the failure of the company to remove the goods after the car was overturned. *Bythe v. Denver, etc., R. Co. (Col.)*, 585, n.

64. *Loss of goods — settlement with consignee — liability to consignor.* In case of unqualified consignment of property, the carrier has the right to assume that the consignee is the owner, and is entitled to settle a claim for damages for the non-delivery of property, with him. *Scammon v. Wells, Fargo & Co. (Cal.)*, 585, n.

65. *Delivery where no station or side track.* A car-load of bricks was consigned to plaintiff at "Cloverfield Sta." There was no station agent or side track there, and no one was upon the ground to receive the bricks. After waiting a few minutes, during which the locomotive whistle was repeatedly sounded, the car was carried to a station a mile beyond, and left upon a side track. Held, that, since the loaded car could not be left upon the track, it was the duty of the company to unload and leave the bricks upon the ground, and the freight having been prepaid, plaintiff was entitled to recover their value. *Louisville, etc., R. Co. v. Gilmer (Ala.)*, 585, n.

66. *Title of consignee — holding goods for prior freight-charges against consignor.* Where goods are consigned generally to the consignee without any particular place of delivery being designated, the title of the consignor passes upon delivery to the carrier. In such case, the carrier cannot, by an agreement in the bill of lading, acquire the right to hold the goods for prior freight-charges against the consignor as well as for those on such goods. *Bacharach v. Chester Freight Line (Penn.)*, 585, n.

CHANGE OF GRADE.

See EMINENT DOMAIN, 2, 29-31, 33.

CHECKS.

See BANKS AND BANKING, 1-8.

CONFLICT OF LAWS.

See INTERSTATE LAW.

CONSTITUTIONAL LAW.

1. *Taxation of sleeping-cars engaged in interstate traffic.* Since a state has the right to tax personal property within its jurisdiction, even though it is employed in interstate commerce, a state tax on such proportion of the whole capital stock of a foreign sleeping-car company as the number of miles over which its cars are operated within the state bears to the whole number of miles over which its cars are operated, is valid and constitutional, though such cars run into, through and out of the state. *Pullman's Palace-Car Co. v. Pennsylvania (U. S.)*, 418.

2. *Foreign express companies — license fees — interstate commerce.* An act of Kentucky requiring the agent of a foreign express company doing business in the state to pay a license fee of \$5. and deposit with the auditor a statement of the company's assets and liabilities, showing that it has an actual capital of at least \$150,000, is unconstitutional, as an interference with interstate com-

CONSTITUTIONAL LAW — *Continued.*

merce, in so far as it applies to companies transporting goods between points in the state and points in other states, though the company may also transport between points within the state. *Crutcher v. Kentucky* (U. S.), 634.

See BONDS, 1-6; ELECTRICITY; EMINENT DOMAIN, 1-3; MUNICIPAL CORPORATIONS, 4-18; RAILROADS, 63-67.

CONTRACTS.

1. *In restraint of trade.* A contract between a domestic firm and a foreign corporation, both engaged in the manufacture and sale of wooden-ware, whereby the former sells its stock, material, tools and machinery to the latter, and agrees not to manufacture or sell wooden-ware in seven named states for five years, nor to permit its property to be used for that purpose during the time limited, is in restraint of trade, and void. *Western Wooden-Ware Assn. v. Starkey* (Mich.), 199, n.

2. Two companies were engaged in the business of issuing "benefit certificates" entitling the holders, in case of sickness or injury, to maintenance, care and medical treatment in any hospital provided by the company. The plaintiff had established a lucrative business of this kind in the states, among others, of Minnesota, Wisconsin and the northern peninsula of Michigan, and had acquired valuable contracts with hospitals in that territory entitling the holder of its certificates to treatment in such hospitals. The two companies entered into a contract by the terms of which the plaintiff agreed to refrain for the term of three years from selling certificates in the territory named, except to railroad employes, and to turn over, as far as in its power, to the defendant, its hospital contracts, in consideration of which the defendant agreed to pay plaintiff a certain sum of money, and also to refrain, for a like period of three years, from selling certificates to railroad employes within the territory referred to. Held, that the contract was not void as being in restraint of trade. *National Benefit Co. v. Union Hospital Co.* (Minn.), 199, n.

3. A person may legally buy the business of another coupled with an undertaking on part of the seller not to carry on the same business in the same place, or within the same territory, and the question of the reasonableness of the restraint of trade in such cases depends upon whether it is such only as to afford a fair protection to the party in whose favor it is made. *Ibid.*

See BONDS; CORPORATIONS, 8, 13; ESTOPPEL; INSURANCE, 7, 8; MUNICIPAL CORPORATIONS, 3-5; RAILROADS, 57-61; TELEGRAPH AND TELEPHONE COMPANIES, 10.

CORPORATIONS.

DE FACTO CORPORATIONS.

1. *How constituted.* A corporation *de facto* exists when, from irregularity or defect in its organization or constitution, or from some omission to comply with the conditions precedent, a corporation *de jure* is not created, but there has been a colorable compliance with the requirements of some law under which one association might be lawfully incorporated for the purposes and with the powers assumed, and a user of the rights claimed to be conferred by the law. *Snider's Sons Co. v. Troy* (Ala.), 25.

2. Under the provisions of the Revised Statutes of Illinois, chapter 32, that the certificate of complete organization shall after its issue by the secretary of

CORPORATIONS — DE FACTO CORPORATIONS — *Continued.*

state be filed in the office of the recorder of deeds in the county where the company has its principal office, and that then the corporation shall be deemed fully organized, even if corporate existence *de jure* depends on such filing, still, having taking all other necessary steps, and elected officers, and carried on business for several years, it would be a *de facto* corporation. *Bushnell v. Consolidated Ice-Machine Co. (Ill.)*, 527.

3. *Individual and partnership liability of stockholders in de facto corporations.* A person who has entered into a contract with a *de facto* corporation in its corporate name and capacity, cannot, in the absence of any averment of fraud afterward disregard the existence of the corporation and sue the stockholders individually as partners on the contract. *Snider's Sons Co. v. Troy (Ala.)*, 25.

4. One who took part in the organization of a *de facto* corporation and was elected and acted as its secretary and general agent, cannot treat it as a partnership, and compel his fellow-corporators to account to him on that basis. *Bushnell v. Consolidated Ice-Machine Co. (Ill.)*, 527.

5. A stockholder cannot be sued individually for the price of goods sold to a *de facto* corporation as such on the ground that it was not legally incorporated. *Cory v. Lee (Ala.)*, 81, n.

6. *Collateral attack.* The existence of a corporation *de facto* cannot be collaterally attacked. *Crowder v. Town of Sullivan (Ind.)*, 586.

ESTOPPEL TO DENY CORPORATE EXISTENCE.

7. A certificate of incorporation provided that the corporate affairs should be controlled by its president, vice-president and attorney, instead of providing for a board of directors or trustees, as required by General Statutes Colorado 1888, section 288; held insufficient to create a corporation *de jure*; also that one who signed such certificate, conveyed property to the company, and acted as one of its officers, was estopped from denying its *de facto* existence. *Bates v. Wilson (Col.)*, 81, n.

POWERS.

8. *Lease of all its property to foreign corporation — rights of stockholders.* A resolution of a board of directors of a domestic corporation contemplated (if ratified at a meeting of stockholders called for that purpose) a transfer of its property and a surrender of the management of its business to a foreign corporation for the period of twenty-five years, in consideration of a specified percentage of the proceeds to be paid by the latter. Held, that at the suit of a non-assenting stockholder of the domestic corporation, such contemplated acts should be enjoined. *Small v. Minneapolis Electro-Matrix Co. et al. (Minn.)*, 31.

9. *Lease of entire property of car company to competing company.* A corporation chartered "for the transportation of passengers in railroad cars, constructed and to be owned by said company," under certain patents, and empowered to enter into contracts with other corporations "for the leasing or hiring and transfer to them" of their railway cars and other personal property leased for a certain rental, for ninety-nine years, to another corporation in the same business, all its property, including its cars and patents, and all contracts with railroad companies for the hire of its cars, and agreed that while the lease was in force it would not engage in the business of manufacturing and using or hiring cars. Held, that the corporation was *quasi public*, and

CORPORATIONS — POWERS — *Continued.*

the lease was void as *ultra vires*, and because it was an abandonment by the lessor of its duty to the public. *Central Transportation Co. v. Pullman Palace-Car Co.* (U. S.), 173.

10. *Sale of entire property for stock in another corporation.* A private corporation may, with the consent of all its stockholders, sell all its property to another corporation, and take stock of the latter company in payment therefor. *Holmes & Griggs Manufacturing Co. v. Holmes & Wessell Metal Co. et al.* (N. Y.), 555.

11. *Power to hold real estate.* The rule is general that, where a corporation is authorized for some purposes, or to a limited extent, to take conveyance of and hold real estate, a deed of lands for other purposes, or beyond the limit allowed, is not absolutely void, but passes the title as between the parties, subject only to be inquired into in a direct proceeding by the state. *Gilbert v. Hole* (S. D.), 688.

12. *How question may be raised.* A corporation organized for the purpose, among others stated, of buying and selling personal property, is to that extent at least organized for a legal purpose, and may, under section 7, article 17, of the constitution, take and hold such real estate as may "be necessary and proper for its legitimate business;" and, under the rule first above announced, whether such corporation has taken the title to lands described for a purpose other than that allowed by the constitution is a matter between the government of the state and the corporation. *Ibid.*

13. *Acquisition of real estate for purposes not authorized — effect on title.* An undisputed allegation in the complaint, that the land described was purchased by such corporation for the "sole purpose of speculation and profit," does not withdraw the case from the dominion of the rule. It is a question of the power of the corporation to receive title; not a question of the conditions under which such power may be exercised, or whether in any case such conditions have been met. *Ibid.*

PROMOTERS.

14. *Secret profits — liability to corporation.* A person who secures an option on a property with a view to organizing a corporation, and selling the property to it, and who, together with another person employed by him, forms the company, and places the stock on representations that the property cost \$2,000 more than it actually did, and also that certain notes would be included in the sale, but after the company is organized informs the stockholders that the notes were not included, though they were received by himself, is accountable to the corporation for the profits thus realized by himself, as he occupied a position of trust toward the subscribers, and could not make secret profits out of the transaction. *South Joplin Land Co. v. Case et al.* (Mo.), 391.

See DIRECTORS AND OFFICERS; ESTOPPEL; MEETINGS; STOCK AND STOCKHOLDERS.

CROSSINGS.

See EMINENT DOMAIN, 7-11, 25-33.

COUNCIL.

1. *Powers of presiding officer in preserving order — false imprisonment.* The power of a mayor, as the presiding officer of a city council, extends no further upon the occurrence of indecorum on the part of any member, than to bring the fact to the attention of the assembly, which may, if it sees fit, after the member has been heard, order him to withdraw, pending its consideration and action, and it is the duty of the president to enforce that order; but he has no power, in the absence of threatened violence to other members, to order the offender into the custody of the executive officer of the assembly, and exclude him from its deliberations, and, if he assumes to do so, both he and the executive officer who carries out his orders are liable in damage for false imprisonment. *Thompson v. Whipple et al.* (Ark.), 111.

2. *Power of city council of St. Louis to confer jurisdiction upon circuit court* See *Union Depot R. Co. v. Southern R. Co.* (Mo.), 622.

See MUNICIPAL CORPORATIONS, 1-2.

DAMAGES.

1. *Excessive damages.* A verdict for \$5,246 was not held excessive where plaintiff, who was thirty-one years of age and earning \$2,500 a year, had sustained a fracture of the clavicle, the dislocation of three ribs, an injury to the lungs and various cuts and contusions, had suffered great pain, and the injuries were permanent, would probably shorten life and greatly impair the plaintiff's ability to labor and endure. *Southern Kans. Ry. Co. v. Walsh* (Kans.) 231.

See CARRIERS, 17-20; EMINENT DOMAIN, 22-40; TELEGRAPH AND TELEPHONE COMPANIES, 10-14.

DEATH BY WRONGFUL ACT.

1. *Action under statute of foreign state.* A New York corporation was sued by a citizen of that state for causing the death of plaintiff's husband and intestate in Pennsylvania. The Pennsylvania statute gave a right of action in such cases to the widow, and did not limit the amount of recovery. The New York statute gave the right of action to the administrator for the benefit of the widow and children. Held, that the statutes were sufficiently similar to sustain the action. *Wooden v. Western N. Y. & P. R. Co.* (N. Y.), 266.

2. *How action should be brought.* Such action should be brought by the plaintiff as widow, and not as administratrix, since the right of action is given by the Pennsylvania statute. *Ibid.*

3. *What statute controls amount of recovery.* The amount of recovery in such action is limited by the New York statute. *Ibid.*

DIRECTORS AND OFFICERS.

1. *Qualifications of directors.* One not appearing to be a stockholder upon the corporate records is not eligible to the office of director, under the statute providing that only stockholders are eligible to that office; one who still so appears is eligible, and may vote notwithstanding he has assigned the stock. In re *Argus Printing Co.* (N. D.); 132.

2. In the absence of any restrictions in the law governing a corporation, a person is eligible to the office of director therein though he is not a stockholder, or a resident or citizen of the state. 151, n.

DIRECTORS AND OFFICERS — *Continued.*

3. *Care of the directors in the discharge of their duties.* The degree of care required of directors depends upon the subject to which it is to be applied, and each case has to be determined in view of its own peculiar circumstances. *Briggs v. Spaulding* (U. S.), 712.

4. *Liability for acts of other directors or agents of the corporation.* Directors are not insurers of the fidelity of the agents whom they have appointed, who are not their agents, but the agents of the corporation; and they cannot be held responsible for losses resulting from the wrongful acts or omissions of other directors or agents, unless the loss is a consequence of their own neglect of duty, either for failure to supervise the business with attention, or in neglecting to use proper care in the appointment of agents. *Ibid.*

5. *Power of directors over the corporate property and business.* Power to wind up affairs of solvent corporation. 35 n

6. To make an assignment for benefit of creditors. 36, n

7. To sell or lease property essential to the corporate purposes. 37, n.

8. *Liability of directors to stockholders.* The motives and expediency which prompt the acts of a board of directors, done within the lawful scope of their powers and authority, are beyond judicial scrutiny. *Trisconi v. Winship et al.* (La.), 40.

9. A board of directors which, in furtherance of the vote of the required majority, directs a total cessation of the business of the corporation and a liquidation of its affairs, acts within the sphere of its lawful authority, and is not chargeable with any loss which the measure, in its execution, may entail on the minority. *Ibid.*

10. Members of a board of directors, who are necessarily shareholders, enjoy, like the other corporators, the right to dispose of their stock, and individually are amenable to no account. *Ibid.*

See BANKS AND BANKING, 9-13; CORPORATIONS, 8.

ELECTION.

See MEETINGS.

ELECTRICITY.

1. *Telephone line and electric railway on same street conflicting rights.* The dominant purpose for which streets in a municipality are dedicated and opened is to facilitate public travel and transportation, and, in that view, new and improved modes of conveyance by street railways are by law authorized to be constructed, and a franchise granted to a telephone company of constructing and operating its lines along and upon such streets is subordinate to the rights of the public in the streets for the purpose of travel and transportation. *Cincinnati Inclined Plane Ry. Co. v. City & Suburban Tel Assn.* (Ohio), 533.

2. *Prior grant to telegraph company to use street is subject to right to establish and operate an electric railway thereon.* The fact that a telephone company acquired and entered upon the exercise of a franchise to erect and maintain its telephone poles and wires upon the streets of a city prior to the operation of an electric railway thereon, will not give the telephone company, in the use of the streets, a right paramount to the easement of the public to adopt and use the best and most approved mode of travel thereon; and, if the operation of the street railway by electricity as the motive power tends to disturb the

ELECTRICITY — *Continued.*

working of the telephone system, the remedy of the telephone company will be to readjust methods to meet the condition created by the introduction of electro-motive power upon the street railway. *Ibid.*

8. *Telegraph company's claim to "ground circuit" not superior though prior—relative rights of the two companies generally.* Where a telephone company under authority derived from the statute, places its poles and wires in the streets of a municipality, and, in order to make a complete electric circuit, for the transmission of telephonic messages, uses the earth, or what is known as the "ground circuit," for a return current of electricity, and where an electric street railway, afterward constructed upon the same streets, is operated with the "single trolley overhead system," so called, of which the ground circuit is a constituent part, if the use of the ground circuit in the operation of the street railway interferes with telephone communication, the telephone company, as against the street railway, will not have a vested interest and exclusive right in and to the use of the ground circuit as a part of the telephone system. *Ibid.*

4. *Electric subways—power to require existing wires in streets to be placed beneath the surface.* Laws of New York 1884, chapter 534, requiring all electric wires in cities of over five hundred thousand to be placed under the surface of the streets, and Laws of 1885, chapter 499, providing for the appointment of a board of commissioners of electrical subways to enforce the act of 1884, and Laws of 1887, chapter 716, ratifying the contract made by the board with the Consolidated Telegraph and Electrical Subway Company of New York, for the construction of subways in which to place the overhead wires, are valid police regulations of the public streets, which cannot be resisted by a telegraph company incorporated under Laws of New York 1848, chapter 265, section 5 as amended by Laws of 1853, chapter 471, section 2, authorizing the erection of poles and stringing of wires in any public roads and highways, provided that the lines should not be so constructed as to incommode the public use of the roads or highways. *American Rapid Tel. Co. v. Hess et al. (N. Y.), 119.*

5. *Effect of acts of congress.* The acts of congress (U. S. Rev. St., § 5263) permitting telegraph companies to construct their lines along any military or post roads, and section 3964 and act March 1, 1884, declaring all letter-carrier routes and all public roads and highways to be post routes, do not give a telegraph company the right to maintain its wires above ground contrary to the laws of the state, nor do they deprive the state of its police control over such highways. *Ibid.*

6. *Electric poles and wires in streets.* See 555, n.

See TELEGRAPH AND TELEPHONE COMPANIES.

EMINENT DOMAIN.

WHAT CONSTITUTES A TAKING OR DAMAGING OF PROPERTY.

1. *Obstructing flood-waters of stream by railroad embankment.* When a railway company erects an embankment for its track along the margin of a river, the accumulated waters of which, in times of flood, had previously escaped on that side, it being lower than the other, but which thereafter, and because of the embankment, overflowed the opposite side more than it had done before,

EMINENT DOMAIN — WHAT CONSTITUTES TAKING, ETC., — *Continued.*

and thus injured land there situate, the owner has a right of action against the company; or if, by the erection of such embankment, the river was deflected from its natural course, or deposits were made therein so as to raise its bottom, and from either of these causes such land was injured by the river when swollen, a recovery may be had for the damages thereby occasioned. *O'Connell v. East Tennessee, V. & G. Ry. Co. (Ga.)*, 448.

2. *Damages from change of street grade.* Such damages not a taking but are within constitution or statutes giving compensation for property *damaged or injured* for public use. 277, n.

3. *Electric poles and wires in streets.* See 555, n.

THE STATUTORY AUTHORITY — WHAT MAY BE TAKEN.

4. *Right of railroad company to condemn gravel pits.* Under the Revised Statutes of Wisconsin, section 1828, subdivision 4, giving railway companies the power, for the purpose of obtaining gravel or other materials, "to take as much land as may be necessary to the proper construction, operation and security of the road," a company desiring to condemn land for such purpose must show the necessity for taking it; and where the findings by the court on this question are that the directors had declared it to be necessary to take the land; that it adjoins the company's main line at a spur track; that the company intends to take from it gravel to ballast the road, but that the taking would work great damage to the owner, and be injurious to the welfare of the people in the vicinity; that there are other places from which gravel may be obtained; and that the taking would be "unreasonable and oppressive"—the petition to condemn should be denied. *Wisconsin Cent. R. Co. v. Kneale (Wis.)*, 122.

5. *Words "necessary additional depot grounds," construed.* Under Laws Iowa 1884, chapter 190, section 1, authorizing railroad companies owning a completed road to condemn lands "for necessary additional depot grounds," upon procuring a prescribed certificate from the railroad commissioners, such commissioners have authority to grant a certificate for the condemnation of land for depot purposes at a place where the railroad company has no depot, and owns no land other than the right of way on which its road is built. *Sager v. Dey (Iowa)*, 127, n.

6. *Power to condemn for "railroad"—what included.* Act Mississippi, December 16, 1836, incorporating a railroad company, conferred (section 4) authority to enter upon lands through which it should deem it necessary to make its "railroad," and (section 5), in case of failure to agree with the owner of land as to the price to be paid him, to have the damages by reason of making "said road" assessed; and declared that the company should be invested with the right to "occupy and use such lands for the purposes of said railroad." Held, that the company was not limited to the right to take only enough land for a road-bed, but could acquire enough for station grounds, side tracks, etc. *Ewing v. Alabama & V. R. Co. (Miss.)*, 128, n.

RAILROAD CROSSINGS.

7. *Right of one road to cross another's tracks.* One railroad company may condemn the right to cross the lands of another company of the same character, although those lands be necessary for the railroad purposes of the latter

EMINENT DOMAIN — RAILROAD CROSSINGS — *Continued.*

company. *National Docks & N. J. J. C. Ry. Co. v. State* (United N. J. Railroad & Canal Co et al., Prosecutors) (N. J.), 560.

8. *Specifying manner of crossing in petition — effect.* The condemning company may, by its petition in condemnation proceedings, designate a lawful manner in which it will cross the lands of the other company, and make compensation for that single manner of crossing, in which case it can thereafter cross only in accordance with the plan thus designated. *Ibid.*

9. When such petition prescribes the manner of crossing, the legality of the plan and manner of crossing proposed may be reviewed in the supreme court upon *certiorari*. *Ibid.*

10. *Rights acquired by condemning company.* In such a condemnation, all that is acquired is the privilege or easement of crossing. The place of crossing is to be and remain in the common use of both companies for the exercise of their respective franchises. *Ibid.*

11. *Remedy in case of conflict as to use of crossing.* If the use of such easement, whether it be acquired under proceedings to condemn a crossing in a specified manner or under proceedings to condemn a crossing generally, a conflict should at any time arise between the companies entitled, the interposition of equity may be invoked to secure to each company the enjoyment of its privilege in a just and lawful manner. *Ibid.*

PUBLIC USE.

12. *The question of public use, how determined.* To determine what is a public use authorizing the exercise of this power, cases and principles, rather than definitions, must be consulted. It is well established by the weight of authority that in determining what is a public use, as contradistinguished from a private use, the peculiar physical conditions and necessities of the country are to be considered. *Oury v. Goodwin* (Ariz.), 81.

13. *Taking for purposes of irrigation.* That in the territory of Arizona the physical conditions are such, and the necessity for the use of water for irrigation so great and indispensable, as to authorize an act of the territorial legislature providing for the condemnation of right of way for ditches or canals by the agent of the territory for the use of thirteen or less farmers (or ranchers) in a farming neighborhood. *Ibid.*

LANDLORD AND TENANT.

14. *Taking land subject to lease — effect upon covenant to pay rent.* Where a part of a tract of land subject to lease is condemned for public use, the tenant's liability for rent is not affected thereby, and damages should be assessed on that basis. *Stubbings v. Village of Evanston* (Ill.), 115.

15. Same subject discussed in note, p. 120.

16. Damages, how apportioned between landlord and tenant. 120, n.

MORTGAGEES.

17. *Whether necessary parties.* The mortgagee was a necessary party to the condemnation proceedings, and his rights were not affected by a condemnation to which he was not a party. *Calumet River R. Co. v. Brown* (Ill.), 153.

18. Same subject discussed in note p. 153.

19. Construction of statutes as to parties, whether mortgagees included. 159 n.

EMINENT DOMAIN — MORTGAGEES — *Continued.*

20. *Remedy of condemnor when mortgage omitted by mistake.* Under a statute requiring all persons interested as owners or otherwise to be made parties, a railroad company instituted proceedings to condemn certain property. The damages were assessed and paid to the county treasurer. Before instituting proceedings the company applied to an abstract firm for the names of all persons interested in the property. The list was furnished, but, by mistake, the name of a mortgagee was omitted, and such mortgagee was not made a party. Held, that there was such a mistake as equity would relieve against, and that a bill would lie by the railroad company against the mortgagee and owner of the equity of redemption to have the money applied upon the mortgage. *Calumet River R. Co. v. Brown* (Ill.), 152.

21. In such case the owner of the equity of redemption cannot complain of a decree which directs the award to be applied on the mortgage debt, and, in case of foreclosure, requires the mortgaged property to be sold in the inverse order of alienation, regarding the condemnation as an alienation, and, in case the balance of the mortgaged debt is not thus realized, allowing a redetermination of the damages by reasons of the taking. *Ibid.*

DAMAGES — MEASURE OF, AND ELEMENTS TO BE CONSIDERED.

22. *Additional fences as an element of damages.* Where a railroad is laid through a tract of land, held, there being no evidence that, to use and enjoy the land as it would probably be used in the future, any additional fences would be made necessary, there is no error in a charge that the land-owner is entitled to nothing for fences. *Newgass v. St. Louis, etc., R. Co.* (Ark.), 44.

23. *Damages by flooding, when property included.* If the appropriation of a part and its use as a railroad results in flooding the land not taken, the damages so occasioned should be included in the assessment, but no account should be taken of injuries which may result from an improper construction or maintenance of the road-bed. *Ibid.*

24. *Value of railroad constructed before condemnation.* The value of a railroad already constructed on the land by the railroad company or its vendors is not to be included in the damages assessed, and in determining the value of the land taken any appreciation or deterioration that may have resulted to it specially from the building of the road on it will be disregarded, but such as may thereby have resulted to it in common with other lands in the neighborhood will be considered. *Ibid.*

25. *When highway is laid out over railroad right of way.* Where a public highway is located and established across a railroad company's right of way, the railroad company is entitled to just compensation for all its necessary expenditures in constructing cattle-guards, and such other things as are required by the statutes to be constructed by the railroad company by reason of the highway. *Kansas Cent. R. Co. v. Board of County Com'rs of Jackson County* (Kans.), 688.

26. A statute of Illinois provides as follows: "Hereafter at all of the railroad crossings of highways and streets in this state the several railroad corporations in this state shall construct and maintain said crossings, and the approaches thereto, within their respective rights of way, so that at all times they shall be safe as to persons and property." 2 Starr & C. Stat. 1927. In a

EMINENT DOMAIN — DAMAGES — MEASURE OF, ETC. — *Continued.*

proceeding to lay out a street across the right of way of the appellant company, it was held, (1) that the statute applied as well to crossings established after the passage of the act as to crossings existing before; (2) that the statute was a valid exercise of police power, and binding upon appellant; (3) that this appellant was not entitled to any compensation on account of the expense of constructing and maintaining the crossing. *Chicago & N. W. R. Co. v. City of Chicago* (Ill.), 697.

27. In such a proceeding nothing can be allowed for damage to the business of the company, or increased trouble or expense in operating its trains caused by delay at the crossing, danger of accidents and the like, as the company takes its franchise subject to the right of the state to establish intersecting highways as the public good may require. *Ibid.*

28. Same question discussed in note, p. 703.

29. *In case of viaduct in street.* In such case the jury, in estimating the damages to the property, should consider its effect as a whole and not the effect of a part only of such improvement. *Springer v. Chicago* (Ill.), 52.

30. *In case of change of grade.* Where the grade of a street is raised, the abutting property-owners are not entitled to recover as damages the amount it would cost to fill their land up to the new grade, nor for loss and inconvenience in the prosecution of their business, caused by increased difficulty of access, nor for the consequences of water in their cellars, caused by increased difficulty in drainage. *Chambers v. Borough of South Chester* (Penn.), 273.

31. The measure of damages in such case is the difference between the market value of the property immediately before and immediately after the change of grade. *Ibid.*

32. The measure of damages in such cases considered in note, p. 277.

33. *In case of one railroad crossing another.* 571, n.

34. Where the condemning company fails to define in its petition how it will cross, and seeks to condemn the privilege of crossing generally, the damages are to be assessed, not only for any manner of crossing at present lawful and necessary, but also for lawful changes in the manner of crossing in the future. *National Docks, etc., R. Co. v. State* (N. J.), 560.

35. *Apportionment as between landlord and tenant.* 120, n.

36. *Judgment for nominal damages, when proper.* When there is no evidence of actual damage, upon which a calculation could be predicated, it was proper to render judgment for the nominal sum of \$1. *Chicago & N. W. R. Co. v. Chicago* (Ill.), 697.

37. *Time with reference to which damages should be assessed.* 48, n.

BENEFITS.

38. *When no part of property taken.* In a suit to recover damages to property by a public improvement, where no part of the property is taken, there can be no recovery unless the market value of the property is depreciated thereby. If the property is benefited as much as it is damaged by the improvement there can be no recovery. *Springer v. Chicago* (Ill.), 52.

39. *Opening street — benefits to adjacent land sold after opening ordered and before commencement of proceedings.* Where, after passage of an ordinance ordaining a street, and before the street is opened, the owner of land sells all

EMINENT DOMAIN — BENEFITS — *Continued.*

except such as is afterward taken for the street, the measure of his damages is the value of the land taken, and the advantage of the opening of the street to the land previously conveyed cannot be taken into consideration. *Whitaker v. Burgess, etc.*, of the Borough of Phoenixville (Penn.), 278.

40. *In case of change of grade.* 277, n.

INTEREST.

41. Where the condemning party was in possession before the commencement of proceedings, the damages should bear interest from the date of filing the petition. *Newgass v. St. Louis, etc.*, R. Co. (Ark.), 44.

EVIDENCE.

42. *Offers to buy or sell.* In a suit for damages to property by a viaduct and its approaches, it is competent to prove the value of the property immediately before and after the making of the improvement, and the price at which the owner offered to sell the property at about the time the viaduct was completed is competent evidence of such value, as being in the nature of an admission by the owner. *Springer v. City of Chicago* (Ill.), 52.

PRACTICE.

43. *Time with reference to which damages should be assessed.* On the condemnation of land taken by a railroad company for its right of way, the damages are to be assessed as of the time of the filing of the petition, and not the time of the original entry, nor of the award. *Newgass v. St. Louis, A. & T. Ry. Co.* (Ark.), 44.

44. *View of premises by jury.* In a common-law action to recover for damages to property by a viaduct the court has power to permit the jury to view the premises in question, and this power is not affected by a statute which makes it imperative upon the court to permit such view in condemnation proceedings upon the application of either party. *Springer v. Chicago* (Ill.), 52.

45. *Landlord and tenant as parties — granting new trial to one only.* Where separate verdicts are rendered in a condemnation suit in favor of the tenant and the reversioner of certain land, the judge may grant a new trial to one defendant without setting aside the verdict as to the other. *Stubbings v. Village of Evanston* (Ill.), 115.

TERRITORY.

46. *Exercise of power of eminent domain by.* The territory of Arizona, though not possessing sovereignty, is clothed with authority to provide for the exercise of the power of eminent domain by the clause in the organic act which says: "The legislative power of this territory extends to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States." *Oury et al. v. Goodwin* (Ariz.), 81.

See RAILROADS, 65-68.

ESTOPPEL.

1. *Estoppel to set up ultra vires.* The lease by one car company of all its property and business to a rival company being *ultra vires*, the performance of such contract by the lessor, and use of the demised property by the lessee, cannot estop the lessee from setting up its invalidity in an action on the contract. *Central Trans. Co. v. Pullman Palace-Car Co.* (U. S.), 172.

ESTOPPEL — *Continued.*

2. *Estoppel of purchaser from corporation to deny its title.* One who has bought property from a corporation cannot, when sued for the price, set up in defense that the corporation had no power to buy and sell the property. *Holmes & G. Manuf. Co. v. Holmes & W. Metal Co.* (N. Y.), 555.
See BANKS AND BANKING, 18-21; BONDS, 23; CORPORATIONS, 3, 4 7; STOCK AND STOCKHOLDERS, 25, 26.

EVIDENCE.

1. *Evidence of plaintiff's negligence on prior occasions.* In a suit for injuries at a railway crossing, evidence that plaintiff had negligently driven over the crossing two hours before the accident is not admissible to show negligence on his part at the time of the accident. *Delaware, etc., R. Co. v. Converse* (U. S.), 484.

2. *Impeaching evidence.* Evidence that the railroad company's night watchman had admitted on the night of the accident that the rear section of the train was going at about fifteen miles an hour when it crossed the highway, is admissible to impeach his credibility, where, on his cross-examination, he has denied making such admission. *Ibid.*

3. *Opinion as to age of fracture of brake-staff.* Where an accident was caused by the breaking of a brake staff, a witness who has been a hardware merchant, and states that he knows the difference between an old break and a new one, may give his opinion as to whether the fracture was old or not. *Moon v. Northern Pac. R. Co.* (Minn.), 323.

4. *Evidence as to plaintiff's children.* In an action for personal injuries caused by negligence it is error to admit evidence of the number and ages of plaintiff's children. *Dayhersh v. Hannibal & St. J. R. Co.* (Mo.), 239.

See EMINENT DOMAIN, 41.

FELLOW-SERVANTS.

See MASTER AND SERVANT.

INSURANCE.

FIRE INSURANCE

1. *Agents.* Where there is evidence that plaintiff (insured), had no knowledge of any limitations on the agent's authority, and the court has properly instructed on the law of agency, it is not error to leave it to the jury to determine whether the agent had authority to make an oral contract of insurance. *Hardwick v. State Ins. Co.* (Ore.), 341.

2. Knowledge of agent binds company. 256, n.; 259, n.

3. Whether to be deemed as acting for the insurer or the insured. 265, n.

4. *Application.* Validity of policy issued upon application with questions unanswered or only partly so 264, n.

5 *Contract of insurance, whether severable.* 266, n

6 *Insurable interest — pleading.* In an action on an insurance policy, the complaint must state that plaintiff had an insurable interest in the premises, failing which a cause of action is not stated *Hardwick v. State Ins. Co.* (Ore.), 341.

7. *Oral contract for insurance.* Where application is made for insurance, and the premium fixed, and the agent orally agrees that in consideration of

INSURANCE — FIRE INSURANCE — *Continued.*

the necessary delay in procuring the execution of the policy the insurance shall begin from the date of the application, this is a valid contract of insurance, on which a recovery may be had if the property is destroyed before the policy issues, and not a mere agreement for a contract, to be executed by execution and delivery of the policy.

8. *Same — authority of agent* An insurance agent's commission certified that he had full power to receive proposals for insurance fix rates of premiums, and receive money, subject to the company's rules and regulations, and such instructions as might be given from time to time by its general agent. The lessee of a hotel made a verbal agreement of insurance with the agent, who stated that a formal application was not necessary. The company, prior thereto, had written policies on the building, and its general manager had written the agent that he would give his attention to any insurance required on the hotel and contents, and upon another occasion that he would take the whole line, and place it in such companies as was specially desired. Held, that this was sufficient to support a finding that the agent was authorized to make the contract, and the company was held liable for a loss which occurred before any policy was issued. *Harron v. City of London Fire Ins. Co. (Cal.)*, 855, n.

9. Validity of oral contracts of insurance 855, n.

10. *Iron safe clause — "open for business."* An insurance policy required the assured to keep books, and to lock them in a fire proof safe when the store was not actually open for business, such books to be produced in case of loss, or the policy to be void. In a suit on the policy it appeared that it was customary for the merchants to keep their stores open for business after dark, but with locked doors, so that customers could get in only by knocking. Plaintiff's clerk, who was in the store at night, writing up the books, left, intending to return in a short time, but while he was away the building was burned and the books destroyed. Held, that the store was open for business, and the temporary absence of the book-keeper without locking up the books did not render the policy void. *Sun Mut. Ins. Co. v. Jones (Ark.)*, 281.

11. *Incumbrances — judgment paid but not discharged of record.* Payment of a judgment which is a lien on the property of a replevin bail of the judgment debtor, to an agent of the judgment creditors, though no satisfaction is recorded extinguishes the lien within the meaning of a condition in an insurance policy that it shall be void if there is any legal incumbrance on the property. *Continental Ins. Co. v. Vanlue (Ind.)*, 244.

12. *Mortgage securing agreement to support insured's father.* An instrument whereby a vendee of land agrees to deliver to his vendor one half of the net proceeds of the land annually, during his life, and which provides that in case of performance of the contract "this mortgage shall be null and void," and that, upon failure to perform, "this mortgage may be foreclosed," is an incumbrance on the land during the vendor's life within the meaning of a provision in an insurance policy that it shall be void if there is any legal incumbrance on the property, though the vendee has always performed his contract. *Ibid.*

13. *Incumbrances — conditions of policy construed.* What are and what are not incumbrances. 252, n.

INSURANCE — FIRE INSURANCE — *Continued.*

14. Disclosure of existing incumbrances, when required. 253, n.
15. False representations as to existing incumbrances avoid policy. 254, n.
16. What representations are deemed false — variance in amount. 255, n.
17. Some particular cases. 256, n.
18. Parol evidence to vary application — false answers written by agent. 256, n.
19. Issuing policy with knowledge of existing incumbrances, waives condition. 259, n.
20. Incumbrances put upon the property between the application and issuance of policy. 259, n.
21. Subsequent incumbrances, when they avoid policy. 260, n.
22. Foreclosure proceedings — levy of execution, etc. 261, n.
23. Assignee's right to recover upon policy, notwithstanding breach of condition as to incumbrances. 262, n.
24. Distribution between voluntary and involuntary incumbrances. 264, n.
25. Incumbrance of part only of insured property — divisibility of contract. 266, n.
26. *Limitation clause in policy.* Where an insurance policy provides that an action thereon must be commenced "within one year from the date of loss," and also requires that payment of loss shall be made "in sixty days after the loss shall have been ascertained and proved," the limitation begins to run from the date of proof of loss, and not the date of loss. *Sun Mut. Ins. Co. v. Jones (Ark.)*, 281.
27. A condition in a policy, that no suit against the insurer shall be sustained unless commenced "within twelve months" next after the loss, is not in contravention of the Code of North Carolina, section 3076, which forbids the insurer to limit the term within which suit shall be brought "to a period less than one year." *Muse v. London Ass. Co. (N. C.)*, 285, n.
28. Where a policy of fire insurance provides that no action upon the policy "shall be sustained unless commenced within six months after the fire," an action cannot be brought on the policy after the lapse of six months and three days after the fire, even though the policy also provides that no action shall be begun until certain examinations have been made, which examinations were not made nor waived by the company until thirteen days after the fire. *Meesmar v. State Ins. Co. (Wash.)*, 285, n.

LIFE AND ACCIDENT INSURANCE.

29. *Accident — injury while violating law — walking or hunting on Sunday.* A person who walks from one town to another on Sunday, for the purpose of hunting, violates the Revised Laws of Vermont, sections 4315, 4316, which forbid hunting on Sunday, or traveling on Sunday, except from necessity or charity; and an injury occasioned by his slipping on frozen ground, while returning home from hunting on Sunday, is not covered by an insurance policy, exempting the company from liability where a "violation of law" is the act, cause or condition, "wholly or partly, directly or indirectly," producing the injury, or where the injury is "effected by any such act, cause or condition, or under its influence." *Duran v. Standard Life & Acc. Ins. Co. (Vt.)*, 443.
30. *Accident insurance — intentional act of another.* A clause in an acci-

INSURANCE — LIFE AND ACCIDENT INSURANCE — *Continued.*

dent insurance policy exempting the company from liability for "intentional injuries inflicted by the insured or any other person" precludes a recovery when the insured has been killed by the intentional act of another, and the company need not show that such injuries were inflicted at the instance of the insured. *Travelers' Ins. Co. v. McCarthy* (Col.), 447, n.

81. *Loss of the sight of both eyes.* Defendant insured plaintiff against accidental death and permanent disability in the sum of \$1,000, the certificate of insurance providing *inter alia* for the payment of "the whole of principal sum named herein," in the event of "the total and permanent loss of the sight of both eyes." Before the insurance, plaintiff had lost the sight of one eye, which was known to the general and the soliciting agent of the company when plaintiff was insured. Subsequently he sustained the loss of the remaining eye. Held, that he was entitled to recover the entire amount. *Humphreys v. National Benefit Assn.* (Penn.), 447, n.

82. *Partial disability — policy construed.* A certificate of membership in an accident insurance association provided for relief for accident resulting in "total permanent" or "partial permanent" disablement, and there was no provision in the certificate itself for the payment of any benefits for an injury which resulted in partial disablement unless it was also of a permanent character. Held, that the liability of the company was not enlarged so as to embrace cases of merely partial disablement of a temporary character by an indorsement on the certificate, which provided that if the member shall sustain bodily injuries, whether partially or totally disabling, "by means as provided for in this certificate," the payment of the weekly relief should exonerate the company from all further liability, following by a schedule designating different kinds of injuries, with a specified period of relief for each, and a statement that "injuries not included in the above schedule will be adjusted on their merits" *Hallobaugh v. People's Mut. Accident Ins. Assn.* (Penn.), 447, n.

83. *Hazardous occupation — hunting for recreation.* A by-law providing that "any member receiving an injury while engaged temporarily, or otherwise, in an occupation more hazardous than the one in which he was engaged when insured," does not apply to a member insured as a merchant, who is accidentally killed while hunting for recreation, though the occupation of hunter is classified by the association as more hazardous than that of merchant, since hunting cannot be said to be his "occupation," even temporarily. *Union Mut. Acc. Assn. v. Frohard* (Ill.), 447, n.

84. *Application — warranty of statements in.* When a party makes unqualified statements in a contract, and therein stipulates that they are full, complete and true, he stipulates for actual, absolute truth, and not for truth according to his belief or understanding. *Johnson v. Maine, etc., Ins. Co. (Me.)*, 104.

85. *Effect of agreeing that all statements are material.* When a party stipulates in a contract that all his statements therein are material, and that falsity in any of them should avoid the contract, the court cannot, without an enabling statute, pronounce any of them immaterial. *Ibid.*

86. *If so agreed any false statement avoids policy.* In a life insurance contract, one of the statements by the assured, stipulated by him to be material and true, viz., that his brother never had insanity, was untrue. Held, that it avoided the contract. *Ibid.*

INSURANCE — LIFE AND ACCIDENT INSURANCE — *Continued.*

87. *Application written by agent — untrue statements — knowledge of agent — waiver.* A life insurance company cannot defeat a recovery on a policy which provides that it shall be void if the application contains any untrue statement, when it appears that its own agent placed the age of the insured, who was unable to read or write and did not know his own age, at less than it really was, stating at the time that he would make the insured out younger than he was. *Keystone Mut. Benefit Assn. v. Jones (Md.)*, 110, n.

88. When solicited to take a policy, the insured told the company's agent that his application had been rejected by another company. The agent filled out an application, and, to the question whether any former one had been rejected, he wrote the answer "No," without the knowledge of the insured, who signed the paper without reading it. The policy provided that the insured adopted as his own, admitted to be material, and warranted as full, complete and true, each of the answers, whether written by his own hand or not. Held that the company could not treat the answer as a warranty, and avoid the policy for its falsity, also that a reformation of the policy was not essential to a recovery. *Germania Life Ins. Co. v. Lunkenheimer (Ind.)*, 110, n.

89. A provision in an accident policy that none of its conditions can be waived by any agent of the company is valid, and a condition that the insurance does not cover a death resulting from intoxication is not waived because the agent who received and filled out the application knew that the applicant was an intemperate man, though the application stated that his habits were correct and temperate. *Cook v. Standard Life & Acc. Ins. Co. (Mich.)*, 110, n.

40. *Conditions avoiding policy — failure to pay premium — waiver by agent.* 109, n.

41. *Suicide — election by company to pay or refund premium — reasonable time.* — An insurance policy was conditioned to be void in case the assured died by his own hand, unless he was insane at the time of taking his life, in which event the insurer reserved to itself the right to pay the amount insured or only to refund the premiums paid, "according to the equities of the case." Held, that though the policy stipulates that the amount of insurance shall be paid within sixty days after due notice and satisfactory proof of the death of the assured, where he takes his own life while insane, the insurer is entitled to a sufficient time to learn all the facts controlling the equities of the case, and three months and a few days, before notifying the beneficiary of the exercise of its option, is not an unreasonable time. *Salentine v. Mutual Ben. Life Ins. Co. (Wis.)*, 296.

42. *Meaning of "legal representatives" in policy.* A old man who had recently been reduced from large wealth to poverty and was largely in debt effected an insurance upon his life, payable to his "legal representatives." He had at the time a wife and several children dependent upon him for support. In a controversy after his death between the widow and children on the one hand, and his administrators on the other, over the proceeds of the policy, it was held that the words "legal representatives," should be construed to mean the widow and children, and that they were entitled to the benefit of the policy. *Griswold et al. v. Sawyer et al. (N. Y.)*, 98.

43. *Beneficiaries — construction of policy.* Where an application for insur

INSURANCE — LIFE AND ACCIDENT INSURANCE — *Continued.*

ance specifies as beneficiaries applicant's wife "and children," and the policy designates them as the wife "and her personal representatives and assigns," which was received by assured without objection, and premiums thereon regularly paid, the application as modified by the policy, will be deemed to be the contract, and the beneficiaries those mentioned in the policy. *Hunter v. Scott* (N. Y.), 103, n.

44. *Policy payable to legal representatives — effect of will.* Policies payable by their terms to the testator's legal representatives, if specifically devised by the will, become a part of his estate, and not the property of the widow; but where it is clear that he intended by his will to dispose of his entire property, including the life insurance as a part of his estate, held, that the widow will take the life insurance, specifically devised in general terms to her use for life, as effectually as if the insurance had been specifically named in the will. *Fox v. Senter* (Me.), 103, n.

45. *Insanity defined.* Unless otherwise apparent from the context, the word "insanity," in statutes and contracts, means inability to reason and will intelligently. *Johnson v. Maine & N. B. Ins. Co. (Me.)*, 104.

MUTUAL BENEFIT SOCIETIES.

46. *Assessments — mandamus to compel second assessment.* Where the by-laws of a mutual benefit association provide that its members shall be subject to but one assessment for each death loss, and one assessment is made from which only part of the amount due on a certificate is paid, *mandamus* will not lie to compel the levy of another assessment in order to pay the balance, and it is immaterial in that regard whether the first assessment was sufficient to have paid the claim in full or not. *People, ex rel. Meyers, v. Masonic Guild, etc., Assn.* (N. Y.), 169, n.

47. *Forfeiture for non-payment — notice.* The members of the order were required, by its constitution, to pay specified assessments on the death of a member, for the maintenance of the beneficiary fund, and by neglect to make payment within a time specified a member *ipso facto* forfeited his rights under the beneficiary contract. Held, that notice of such assessments made upon members must be given to them before they could be deemed to be in default for non-payment. *Scheufler v. Grand Lodge, etc.* (Minn.), 170, n.

48. *Notice a condition of forfeiture for non-payment.* Plaintiff's certificate stipulated that it was subject to the constitution and by-laws, and provided that "a notice addressed to a member at his post-office address, as appearing upon the books of the association, * * * shall be deemed a sufficient notice." The certificate was to become void if any of the payments provided for were not made "when due." The holder of a certificate failed to pay a June assessment for more than thirty days, and the plaintiff, the beneficiary, averred that no notice was mailed or received, while defendant alleged that it was. Held, that if no notice was mailed the certificate was not forfeited, and that the question whether the notice was mailed or not was properly submitted to the jury, under an instruction that, if it was, they must find for defendant. *Mutual Reserve Fund Life Assn. v. Hamlin* (U. S.), 170, n.

49. *Payment by check sent through the mails — delay — forfeiture.* A certificate provided that, if any assessment should not be paid within ten days after

INSURANCE — MUTUAL BENEFIT SOCIETIES. — *Continued.*

notice thereof, at the office of the company in Cincinnati, Ohio, the certificate should be void. The assured, who lived in Watertown, N. Y., was notified by mail that an assessment was due, and the notice contained the following: "Assessments are payable at this office in cash, by sight draft on Cincinnati or New York banks, money order, or American or U. S. Express Company money order, payable to," secretary. The assured, however, had already paid fifteen separate assessments by mailing his check, and no objection had been made thereto; and in this instance he mailed his check early enough to reach Cincinnati in regular course of mail before the expiration of ten days, but it was not received in time. Held, that the jury were warranted in finding that this method had been acquiesced in by the company, and that the certificate was not forfeited. *Kenyon v. Knights Templar & M. Mut. Aid Assn. (N. Y.)*, 170, n.

50. *Beneficiaries, who may be — member's fiancée.* Under Acts Massachusetts 1882, chapter 195, section 2, which provides that mutual benefit societies may make their certificates payable to the "widows, orphans or other relatives of deceased members, or any persons dependent upon deceased members," a certificate may be made payable to a member's *fiancée*, who is supported partly by her own labor and partly by money paid her by such member, though he is under no legal obligation to make such payments. *McCarthy et al. v. New England Order of Protection et al. (Mass.)*, 165.

51. *Change of beneficiary.* Where a society's by-laws provide in what way the beneficiary may be changed, an attempt by the member to change the beneficiary by will, without complying with the requirements of the by-laws, is inoperative. *Ibid.*

52. Where the by-laws of a mutual benefit association provide that the beneficiary in any certificate may be changed by its surrender and the payment of a fee, whereupon a new certificate would issue to the new beneficiary, a mere indorsement on a certificate by the holder thereof directing payment to one other than the beneficiary named therein is not sufficient to entitle such other to receive the benefit. *Jinks v. Banner Lodge (Penn.)*, 171, n.

53. A provision in a certificate of membership in a mutual benefit association, empowering the member to change the beneficiary by "writing filed with the association," is substantially complied with by the member's written request, filed with the association, to substitute his executors, named in a will of a designated date, for the beneficiary named in the certificate, and an indorsement by the secretary on the certificate making the change. *Bowman v. Moore (Cal.)*, 171, n.

54. *Beneficiaries — effect of subsequent by-laws as to persons entitled to benefits.* A member of a mutual aid association directed, in accordance with its laws, that a benefit of \$1,000 on his death should be paid to his uncle and aunt. He afterward married. A subsequent amendment of the laws of the association provided that such benefit should be paid, on the decease of a member — First to the widow; second, to the children, if there be no widow; third, to the parents, if there be no widow or children; and empowered a member to designate any beneficiary; provided, that he must leave at least one-half thereof to the widow, if there be one, and, if not, then at least one-half to the children, if any. The member thereafter died, leaving a widow, without having made

INSURANCE — MUTUAL BENEFIT SOCIETIES — *Continued.*

any other designation. Held, that the widow took the whole fund, as the designation could not operate, under the laws as amended, not even to cut down her right to one-half of the fund. *Sanger v. Rothschild* (N. Y.), 171, n.

55. *Forfeiture — misrepresentation.* An application for an insurance certificate contained the following questions and answers: "State precise nature of business? Importer and wholesale dealer in wines and liquors. Is the person engaged in any way in the retailing of alcoholic liquors? No; keep no bar, and sell only at wholesale; have government license and town license." The government license gave permission to sell in quantities not less than five gallons, while the town license allowed sales in quantities less than five gallons, but not to be drank on the premises. It appeared that the applicant sold by the pint, quart and bottle, as well as in large quantities, but not to be drank on the premises. Held, that the question whether the answers in the application covered such sales was for the jury. *Kenyon v. Knights Templar & M. Mut. Aid Assn.* (N. Y.), 171, n.

56. *Same — waiver of condition.* The by-laws of a mutual beneficiary association organized under Statute Massachusetts 1877, chapter 204, section 1 (Pub. St., chap. 115, §§ 2, 8), provided that only male Roman Catholics between the ages of twenty and fifty-one years were eligible to membership. The application of decedent which designated plaintiff as his beneficiary described him as about forty-nine old, when in fact he was over fifty-one years old. Held, that even if the officers of the corporation attempted to waive the condition as to age they could not do so. *McCoy v. Roman Catholic Mut. Ins. Co.* (Mass.), 171 n.

57. *Forfeiture — effect of application for reinstatement as an admission.* Where it is claimed that a member has forfeited his rights for non-payment of assessments, the fact that he made application for reinstatement to membership cannot be regarded as a waiver of his rights as a member, when in fact his membership was not forfeited by his failure to pay the assessment, since no notice of it was mailed him. *Mutual Reserve Fund Life Assn. v. Hamlin* (U. S.), 172, n.

58. *Funeral benefit — member in arrears.* Under the constitution of a mutual benefit society which provides that a member shall be entitled to funeral benefits if he is "not more than three months' dues in arrears at the time of his death," a member whose dues are in arrears for three months, and who dies the day before the dues for the following month are payable, is entitled to funeral benefits. *Sherry v. Operative Plasterers' Mut. Union* (Penn.), 172, n.

59. *Forfeitures — burden of proof.* Where the plaintiff alleges generally a compliance with the terms of the policy, and the defense is a breach of a condition avoiding the policy, the burden of proving the breach is upon the defendant. *Scheufler v. Grand Lodge, etc.* (Minn.), 172, n.

See RAILROADS, 60.

INTERSTATE COMMERCE.

1. Where parties contract to engage in interstate commerce, they do so subject to the right of congress to afterward pass laws regulating such commerce. *Fitzgerald v. Grand Trunk R. Co.* (Vt.), 381.

2. The statute of Maine (Rev. St., chap. 24, § 50) requiring common carriers who bring into the state persons not having a settlement therein to remove

INTERSTATE COMMERCE — *Continued.*

them beyond the state if they fall into distress within a year, etc., is a regulation of foreign and interstate commerce, and is in violation of article 1, section 8, clause 3, of the constitution of the United States, and is, therefore, void. *City of Bangor v. Smith* (Me.), 645, n.

3. A steamboat while engaged in carrying passengers on the Ohio river from one Indiana town to another is not engaged in interstate commerce, though the voyage begins and ends at a city in Kentucky. *Dugan v. State* (Ind.), 645, n.

4. When property is rightfully delivered to a common carrier to be transported to a point outside the limits of the state, the duty of the carrier is not merely to transport the property in the state, but to such point outside the limits in another state, and where such property has lawfully commenced to move as an article of commerce from one state to another, that moment it becomes the subject of interstate commerce, and, as such, is subject only to national regulation. *Bennett v. Am. Express Co.* (Me.), 579.

See CONSTITUTIONAL LAW, 1, 2.

INTERSTATE LAW.

See CARRIERS, 45, 46, 53; DEATH BY WRONGFUL ACT.

INTEREST.

See BONDS, 14; EMINENT DOMAIN, 40.

IRRIGATION.

See EMINENT DOMAIN, 12, 18.

LACHES.

See BONDS, 7, 8.

LANDLORD AND TENANT.

1. Effect of taking under the eminent domain power upon the covenant to pay rent. 120, n.

2. Apportionment of damages as between landlord and tenant in condemnation proceedings. 120, n.

See EMINENT DOMAIN, 14-16, 44.

LIMITATIONS.

See BONDS, 7; CARRIERS, 49, 50; INSURANCE, 25-27.

MASTER AND SERVANT.

DUTY OF MASTER TOWARD SERVANT.

1. It is part of the master's duty to use ordinary care to furnish the employe a place to work reasonably as safe as the nature of the employment permits, and not to expose him to any unknown risks, not ordinarily incident to the service. *Dayharsh v. Hannibal*, etc., R. Co. (Mo.), 289.

2. Any duty which the master is required to perform for the safety and protection of his servants cannot be delegated to any servant of any grade, so as to exempt the master from liability to a servant who has been injured by its non-performance. *Miller et al. v. Southern Pac. R. Co.* (Ore.), 1.

FELLOW-SERVANTS.

3. *Relation of fellow-servants, how determined.* It is the law, in the absence of express contract, that establishes the relation of the parties creating him

MASTER AND SERVANT — FELLOW-SERVANTS — *Continued.*

agent or representative of the master who performs duties which the law itself makes it incumbent on the master to perform, and not the rules or regulations of the company designed for the guidance of its servants, and to secure reasonable safety in the conduct of its business. *Ibid.*

4. *Switchman and engineer are fellow-servants.* The co-operation of the switchman is necessary to the successful management of the trains, and employes upon the train in the common service assume the risk of the negligent discharge of his duty. *Ibid.*

5. *Negligence of foreman.* Where one employe is in charge of a certain part of defendant's railroad business, as, in this case, of a round-house, the engines there, and the men necessary to care for them, he is not to be regarded as a fellow-servant of a laborer working at the time under his orders, in respect of acts done by the former in pursuance of his authority over the branch of business under his charge. *Dayharsh v. Hannibal & St. J. R. Co. (Mo.)*, 239.

6. The fact that such "boss" personally acted in a negligent manner, whereby plaintiff was injured, will not relieve defendant of liability where the act was one within the scope of the authority of the "boss" to direct and supervise as the representative of the master. *Ibid.*

6. *Who are fellow-servants — master and servant are fellow-servants.* Though the safety of the laborers on a work train requires that the engineer should give the customary signals when the train is about to start, and it is made a part of his duty to give the signals, his failure to do so is the negligence of a fellow-servant, and the railroad company is not liable for a resulting injury to a laborer on the train. *Higgins v. Mo. Pac. Ry. Co. (Mo.)*, 17, n.

7. A railroad company is liable to a laborer, working at a derrick of the company, assisting in hoisting stone and giving signals, for injuries caused by the negligence of the foreman, whose duty it was to direct repairs and keep the derrick in safe condition, if such laborer is without fault. *Union Pac. Ry. Co. v. Fray (Kans.)*, 17, n.

8. A foreman employed by a railroad company, having exclusive charge and control of the laborers working under him, with full authority to direct where they shall work, is not a fellow-servant of the laborers, and the railroad company is liable for his negligence in ordering them to work in a dangerous place. *Louisville, etc., Ry. Co. v. Graham (Ind.)*, 18, n.

9. The brakeman and engineer upon the same train are fellow-servants. *Hobbs v. Atlantic, etc., Ry. Co. (N. C.)*, 18, n.

10. A car-inspector and repairer employed in a railroad yard held a fellow-servant with a conductor of a train in the same yard, through whose negligence he was injured. *Whitney v. Boston & Me. R. Co. (Mass.)*, 18, n.

11. The fireman on one engine and the engineer of another in the same yard held fellow-servants. *Peaslee v. Fitchburg R. Co. (Mass.)*, 18, n.

12. A car-inspector and brakeman held not to be fellow-servants where the negligence consisted in the failure of the car-inspector to detect a defective brake. *Morton v. Detroit, etc., R. Co. (Mich.)*, 18, n.

13. A switchman and yard-master are not fellow-servants. *Lyttle v. Chicago, etc., R. Co. (Mich.)*, 18, n.

14. *When negligence of fellow-servant does not exempt master from liability.* Plaintiff was injured by the derailment of the train of which he was engineer,

MASTER AND SERVANT — FELLOW-SERVANTS — *Continued.*

from running into a partly-open switch. About a year before, the switch had been abandoned, the lights taken down, and the rails spiked. The rules required engineers not to run over fifteen miles an hour in passing a switch which was in daily use. Plaintiff was running forty-five or fifty miles an hour. Plaintiff's evidence was to the effect that he did not know of the reopening of the switch, and that if there had been lights on it, he could have seen them in time to prevent the accident. Held, that if this was the case, the negligence of the company in not having lights was a concurrent cause of the accident, and plaintiff could recover, though the switch was left open by a trespasser or fellow-servant. *Town v. Mich. Central R. Co. (Mich.)*, 18, n.

15. Where a servant is injured by an accident caused by the failure of a fellow-servant to perform a particular duty because of his absence from his post, evidence that such fellow-servant was in the habit of leaving his post when his presence there was necessary to prevent accidents, and that the master might, by the exercise of reasonable diligence, have known of such habit, is sufficient to establish the master's negligence. *Coppins v. New York Cent., etc., R. Co. (N. Y.)*, 18, n.

16. A railroad company having cut its road-bed along the side of a mountain, it is negligence for it to leave masses of rock, which had been loosened in blasting, in such a position that they are liable to fall at any time upon the track; and it is not relieved from liability for a consequent injury to an employe on its train by the fact that it hires a track-walker, whose duty it is before and after the passage of each train, to see whether rock has fallen, or is about to fall, even though it be assumed that the track-walker is a fellow-servant with the employe, for without the prior negligence of the company, the negligence of the track-walker could not have resulted in the injury. *Bean v. Western N. C. R. Co. (N. C.)*, 19, n.

17. The action of an engineer on a switch-engine in permitting the engine to be operated under his direction by his fireman, who had nearly two years' experience at the work, and who had been accustomed to handle the engine, is not such negligence as will enable a fellow-servant to recover from the railroad company for an injury sustained in coupling a car to the engine while being so operated by the fireman. *Thompson v. Lake Shore, etc., Ry. Co. (Mich.)*, 19, n.

18. The fact that an injury to a servant was caused by the negligence of a fellow-servant does not excuse the master from liability therefor where it appears that the accident would not have happened had not the master himself been negligent. *Coppins v. New York Central, etc., R. Co. (N. Y.)*, 19, n.

See RAILROADS, 18-55.

MEETINGS.

1. *Stockholders' meetings in foreign state — validity.* General Statutes of Kentucky, page 769, which require the election of directors of a domestic corporation to be held within the state, does not prevent a stockholders' meeting to increase the capital stock from being held outside of the state; and where all the stockholders are present at the meeting, and agree to the increase, and receive proportionate shares of the increased stock, they cannot question the validity of the meeting in an action brought against them by

MEETINGS — *Continued.*

creditors of the corporation to compel them to pay the par value of the stock as a trust fund for the creditors. *Handley v. Stutz* (U. S.), 482.

2. *Separate meetings by different factions — validity of election.* A stockholder holding a majority of the subscribed capital stock having acquiesced in the organization of a stockholders' meeting, and having participated in the business of the meeting as so organized, among other things having nominated persons for the office of director, cannot afterward withdraw from the meeting, and organize another meeting, at the same time and in the same place, and by voting at that meeting elect the persons voted for by him the directors of the corporation. It is his duty to remain in the meeting first organized, and vote his stock there, and no one can prevent his voting his stock at that meeting, although his ballot may be rejected. Notwithstanding such rejection, had he voted his stock at the original meeting the persons voted for by him would have been elected directors, and under the statute declared by the court elected. *In re Argus Printing Co.* (N. D.), 132.

3. *Stockholders' meeting — recording — acts not necessary to validity — proof.* The failure to enter in the books of a corporation, at the time it was adopted, a resolution increasing the amount of the capital stock, does not affect the validity of the increase, as such corporate acts may be proved as well by parol as by written evidence. *Handley et al. v. Stutz et al.* (U. S.), 482.

MORTGAGEES.

Whether necessary parties in condemnation proceedings. 158, n.

See EMINENT DOMAIN, 17-21; INSURANCE, 11-24.

MUNICIPAL CORPORATIONS.

COUNCIL.

1. Power of presiding officer to order member into custody. *Thompson v. Whipple* (Ark.), 111.

2. Cannot delegate its powers. *Chicago v. Trotter* (Ill.), 78.

CONTRACTS.

3. *Mode of contracting — notice.* In the absence of any statutory provision requiring notice, a city may make a contract for electric light, to be paid for from the corporate treasury without giving any notice. *Crowder v. Town of Sullivan* (Ind.), 586.

INCURRING DEBT IN VIOLATION OF CONSTITUTION.

4. *Light contract for a term of years — creating debt in excess of limit.* A contract between a city and a private corporation, whereby the latter agrees to supply the city with light for a specified number of years at a certain price per year, does not create a debt for the sum of all the annual payments, within the meaning of the statutory limitation on municipal indebtedness, since the payment for each year does not become obligatory till the services for that year have been rendered. *Ibid.*

5. The constitution of Georgia provides that a debt cannot be incurred by a town, without the approval of two-thirds of the voters thereof. Held that the making of a contract for lighting the town for ten years, by the terms of which \$2,000 was to be paid annually in monthly installments did not create a debt within the meaning of the constitution. *Lott v. Mayor, etc., of Waycross* (Ga.), 590, n.

MUNICIPAL CORPORATIONS—*Continued.*

LIABILITIES.

6. *For personal injuries caused in the erection of school-house.* A city is not liable for injuries sustained by reason of a horse's becoming frightened from the blasting of rock in excavating for a public school-house, since the work is purely for the benefit of the public. *Howard v. City of Worcester (Mass.)*, 270.

7. *For negligence in the exercise of duties and agencies of a public nature.* 273, n.

ORDINANCES — POLICE REGULATIONS.

8. *Prohibiting street processions without permit, etc.* An ordinance prohibiting street processions, except by permission of the superintendent of police is unreasonable as vesting in a single man the arbitrary discretion of granting permits to whom he pleases, or of denying them altogether. *Chicago v. Trotter (Ill.)*, 73.

9. Such ordinance is also invalid as delegating to the superintendent of police the power and discretion vested in the council by statute. *Ibid.*

10. Validity of ordinances regulating or prohibiting street processions. 75, n.

POWERS.

11. *To erect a building to be used in part by a Grand Army post.* A city has no power to appropriate public money for the erection of a building to be used in part by a certain Grand Army post during its existence as an organization, since that is not a public use. *Kingman et al. v. City of Brockton et al. (Mass.)*, 128.

12. *To grant use of a portion of street to private parties.* Without express statutory authority, a municipal government cannot grant to any person the right to erect and maintain in a public street a structure such as a permanent fish-box, for his private and exclusive use. *Laing v. Mayor, etc., of City of Americus (Ga.)*, 228.

13. *To regulate or prohibit street processions.* Under the general power to regulate the use of the streets and to regulate the police of the city, a city is not authorized to pass an ordinance prohibiting parades or processions in the streets until a permit therefor has been obtained from the superintendent of police. *City of Chicago v. Trotter (Ill.)*, 73.

STREETS.

14. *Obstructions — summary abatement of nuisance.* The charter of Americus invests the city council with full power to clear the streets of all obstructions, and this power may be exercised summarily, and without granting a preliminary hearing, after notice to remove, and refusal. *Laing v. Americus (Ga.)*, 228.

15. *License to carry on a business confers no right to use street therefor.* A license from the city to carry on the business of a fish-dealer, etc., gives no vested right to keep a box in the street, and use it in the business. *Ibid.*

TAXATION.

16. What is a public purpose for which the power of taxation may be exercised. *Kingman v. City of Brockton (Mass.)*, 128.

See BONDS; COUNCIL.

MUTUAL BENEFIT SOCIETIES.

See INSURANCE, 45-58.

NEGLECTANCE.

CONTRIBUTORY.

1. *Voluntary exposure to danger to save human life.* It is not negligence *per se* for one to voluntarily risk his own safety or life in attempting to rescue another from impending danger. The question whether one so acting should be charged with contributory negligence, in an action brought by him to recover damages for injuries received in attempting the rescue, is one of mixed law and fact, and should be submitted to the jury upon the evidence, with proper instructions from the court. *Pennsylvania Co. v. Langendorff (Ohio)*, 290.

2. While one who rashly and unnecessarily exposes himself to danger cannot recover damages for injuries thus brought on himself, yet, where another is in great and imminent danger, one who attempts a rescue may be warranted by surrounding circumstances in exposing his limbs or life to a very high degree of danger; and in such cases he should not be charged with the consequences of errors of judgment resulting from the excitement and confusion of the moment. *Ibid.*

3. *When a recovery may be had.* In such cases, if the rescuer does not rashly and unnecessarily expose himself to danger, and is injured, the injury should be attributed to the party that negligently or wrongfully exposed to danger the person who required assistance. *Ibid.*

4. *Hiding on platform of car.* 164, n.

5. *Mistaken judgment in presence of sudden peril.* 296, n.

6. *Burden of proving.* The burden of proving contributory negligence is on defendant. *Georgia Pac. R. Co. v. Davis (Ala.)*, 330.

IMPUTED NEGLIGENCE.

7. *Of parent to child.* Where a child of tender years is injured by the negligence of another, the negligence of his parents, even though present at the time of the accident, cannot be imputed to him so as to support the defense of contributory negligence to his suit for damages. *Chicago City Ry. Co. v. Wilcox (Ill.)*, 672.

8. *Of driver to occupant of vehicle.* 688, n.

See CARRIERS; MASTER AND SERVANT; RAILROADS; TELEGRAPHS.

ORDINANCES.

See MUNICIPAL CORPORATIONS; RAILROADS, 64.

PLEADING AND PRACTICE.

1. *Amendments by interlining.* Though it is the proper practice, as prescribed by the Revised Statutes of Missouri, 1879, sections 3576, 3577, to entirely rewrite a pleading when it is amended so as to make new averments, yet it constitutes no ground for reversal that the lower court allowed such an amendment to be made by way of interlineation. *South Joplin Land Co. v. Case (Mo.)*, 391.

2. *Directing verdict.* Where the whole case turns upon a question of law, which is decisive of its merits, the court may direct a verdict for the defendant. Even if this be irregular, it is no cause for a new trial, where a recovery would be impossible. *Laing v. Mayor, etc., of Americus (Ga.)*, 228.

PLEADING AND PRACTICE — *Continued.*

8. *Effect of general denial.* In an action on the policy, where defendant pleads an incumbrance as vitiating the policy, plaintiff cannot raise the issue of waiver under a general denial. *Continental Ins. Co. v. Vanlue (Ind.)*, 244.

4. *Error presumed to be prejudicial.* Error is presumptively prejudicial. One claiming it to be harmless must affirmatively show it to be so. *Dayharsh v. Hannibal & St. J. R. Co. (Mo.)*, 239.

5. *Physical examination of plaintiff in accident cases.* Under the common law, the courts of the United States have no power, in an action for personal injuries, to order before the trial an examination of the body of the injured person. *Union Pacific Ry. Co. v. Botsford (U. S.)*, 645.

6. Revised Statutes of the United States, sections 861, 863, provide that the mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided. The only power of discovery conferred by congress (Rev. Stat., § 724) is to require the parties to produce books or writings in their possession or power in cases where they might be compelled to produce the same by the ordinary rules of proceedings in chancery. Held, that such statutes do not authorize such examination. *Ibid.*

7. Revised Statutes, section 914, providing that the practice, pleading and forms and modes of proceeding in the courts of each state are to be followed in actions at law in the courts of the United States held within the same state, does not apply to such examination. *Ibid.*

8. *Removal of cases.* The statute of a state giving the state court exclusive jurisdiction of the settlement of claims against the estates of deceased persons, cannot affect the right to remove to the federal court, on the ground of diverse citizenship, a suit commenced in the state court to establish a claim against an administrator. *Clark v. Bever (U. S.)*, 460.

9. *Jurisdiction of the supreme court of the United States — amount involved.* The jurisdiction of the supreme court of the United States of an appeal from a decree refusing to allow a claim for more than \$5,000, against an administrator, all of which was disputed, cannot be questioned on the ground that it does not appear that the estate, when distributed, will yield for plaintiff's claim as much as \$5,000. *Ibid.*

See EMINENT DOMAIN, 42-44.

PLEDGE.

See STOCK AND STOCKHOLDERS, 4.

POLICE POWER.

1. Whether, under the police power, one street railroad company can be compelled to admit another company to the joint use of its tracks. 681, n.

2. Power of legislature to compel railroads and other *quasi* public corporations to make alterations and construct works for the purpose of promoting the public safety, convenience and welfare. 206, n.

3. Regulating the crossing of railroads by highways. 208, n.; 708, n.

4. Compelling railroads to construct cattle-guards and fences. 210, n.

5. Compelling two railroad companies to unite in constructing a passenger station at their intersection. 210, n.

6. Compelling street car company to sprinkle its tracks. 210, n.

POLICE POWER — *Continued.*

7. Compelling railroad companies to maintain a flagman at highway crossings. 211, n.

See ELECTRICITY, 4, 5; MUNICIPAL CORPORATIONS, 8-10.

PROMOTERS.

See CORPORATIONS, 14.

PUBLIC USE.

See EMINENT DOMAIN, 12, 13.

RAILROADS.

ACCIDENTS AT CROSSINGS.

1. *Contributory negligence* — *failure to look and listen* — *relying upon acts of gateman*. Plaintiff's intestate was killed by an engine backing up against him as he was attempting to cross the track on a public street. There were five tracks, and he was unacquainted with the locality. He did not start to cross until the gateman had raised the gates, and he could not see the engine, on account of intervening cars, until he was only five feet from it. The place of safety between the tracks was only three feet wide. The intestate had his head down, looking at the sidewalk, which was rough, and did not see the engine. Held, that the question of contributory negligence was for the jury. *Oldenberg et al. v. New York Cent. & H. R. R. Co.* (N. Y.), 356.

2. *Running switch in night-time* — *facts held to constitute negligence as matter of law*. The severing of a train of cars in the night-time, leaving the rear portion of them uncontrolled, otherwise than by ordinary brakes, to make a running switch across a public highway at grade, without any warning that they are approaching, is in such obvious disregard of the rights of a traveler on the highway, who attempts to drive across after the passage of the first section of the train, that the court is warranted in instructing the jury, as matter of law, not simply that such facts are evidence of negligence, but that they constitute negligence. *Delaware, L. & W. R. Co. v. Converse* (U. S.), 434.

3. *Contributory negligence* — *instructions*. A finding by the jury, on conflicting evidence, that plaintiff was not guilty of contributory negligence, will not be disturbed where the court has charged that it was plaintiff's duty to stop a safe distance from the track and look and listen for trains; that if, after crossing the first or second tracks, the plaintiff, by the exercise of great care, could have discovered the approach of the cars on the third track, he was guilty of carelessness in not stopping short of that track; and that, if plaintiff's view was obstructed by standing cars, he was guilty of negligence in not standing up in his carriage, if by so doing he could have seen over them. *Ibid.*

4. *Duty to look and listen*. It is the duty of a person about to cross a railroad track, to exercise every reasonable precaution in looking and listening for approaching trains, and a failure to do so is contributory negligence which will defeat a recovery. *Louisville, etc., R. Co. v. Stommel* (Ind.), 860, n.

5. If the view is obstructed, or if the sound of an approaching train is liable to be obscured by the wind or other noise, or if the crossing is otherwise dangerous, the precautions of the traveler should be correspondingly increased. *Cincinnati, etc., R. Co. v. Howard* (Ind.), 860, n.

6. *If plaintiff is driving, diligence may require that he should stop his wagon and listen*. Plaintiff drove a team attached to a lumber wagon toward a rail-

RAILROADS—ACCIDENTS AT CROSSINGS.—*Continued.*

road crossing, with his back to an approaching train. Intervening objects obscured a view of the track so that he could not see the train until within a few feet of the crossing, and then only when it was a short distance from the crossing. A mill in the vicinity made considerable noise, and the wind was blowing in a direction to take the sound of a whistle from plaintiff. On reaching the crossing, the team hesitated, but plaintiff urged them across, and was struck by the train. He was thoroughly familiar with the crossing, and knew that the train was due. Held, that it was not sufficient that plaintiff looked and listened for the train as he drove along, but he should have stopped his wagon and listened. *Brady v. Toledo, etc., R. Co. (Mich.)*, 360, n.

7. *Where there are several tracks, duty to look before crossing each track.* Plaintiff's husband was killed by a train while attempting to cross a railroad on a public street. It was in the evening, but there was nothing to obstruct the view. Plaintiff walked about three feet behind her husband. She testified that when they reached the first track she could neither see nor hear a train. The accident occurred on the fourth track. There was no evidence that either she or her husband looked or listened after crossing the first track. Held, that plaintiff could not recover, not having shown that her husband was free from contributory negligence. *Wiwirowski v. Lake Shore, etc., R. Co. (N. Y.)*, 360, n.

8. *When rule requiring plaintiff to look and listen does not apply.* Where plaintiff, who was unacquainted in the neighborhood, was crossing the defendant's tracks in the evening in a thickly-settled part of a city, and the sidewalk was continuous, and there was no flagman or light, and the view was obstructed, it was held that the circumstances of the case make it an exception to the general rule requiring persons approaching a railroad crossing to look and listen before attempting to cross. *Winchell v. Abbott (Wis.)*, 360, n.

9. *Whether plaintiff must continue to look and listen—unlawful speed of train.* In an action for injuries from a railway train while driving over a crossing, plaintiff testified that he looked for the train when between fifty and sixty feet from the crossing, and there was evidence that he could then have seen the train, had it been within a certain distance of the crossing. If the train had been that distance away, and running on statutory time, plaintiff would have passed beyond the crossing before the train reached it. Held, that it could not be said, as matter of law, that plaintiff was negligent in failing to look again for the train on approaching the track, though he could then have seen a greater distance in the direction of the train, and might have stopped his team instantly, as he had a right to assume that trains were moving at lawful speed. *Piper v. Chicago, etc., R. Co. (Wis.)*, 361, n.

10. *After waiting for train to pass, duty to look and listen before proceeding upon another track.* Where deceased waited for the passage of a train on one of defendant's tracks, stepped on to an adjoining track, and was run over by a train which he could have seen had he stopped to look, he was guilty of contributory negligence. *Daniels v. Staten Island Rapid Transit R. Co. (N. Y.)*, 361, n.

11. *Where one residing in the neighborhood of a railroad, the second track of which was used for west-bound freight, and the third track for east-bound*

RAILROADS — ACCIDENTS AT CROSSINGS — *Continued.*

passenger trains, crosses the second track at a permissive crossing immediately after a freight has passed, and is run into by an east-bound passenger train as he steps upon the third track, he is guilty of contributory negligence which will prevent recovery. *Kraus v. Pennsylvania R. Co.* (Penn.), 361, n.

12. *Attempting to pass when safety-gates down.* Plaintiff's intestate attempted to cross defendant's road on a street across which there were four tracks. Two trains were approaching at the time, and in avoiding one he was killed by the other. The safety-gates were down when he attempted to cross, and he knew that their being down signified that trains were passing. Held, that plaintiff should be nonsuited. *Cherry v. Philadelphia, etc., R. Co.* (Penn.), 442, n.

13. *Attempting to pass between cars of standing train.* A person who attempts to cross a street which is obstructed by a train of cars, by stepping on the coupling-pins, and climbing across, without looking to see if there is an engine attached, is guilty of such contributory negligence as will prevent his recovery from the railroad company for injuries sustained by the sudden starting of the train. *Hudson v. Wabash, etc., R. Co.* (Mo.), 443, n.

14. Plaintiff cannot be relieved in such case from the effects of his negligence by the fact that there was an ordinance prohibiting railroad companies from obstructing streets with their cars. *Ibid*, 443, n.

15. *Crossing in front of approaching train — mistaking speed of same.* Deceased was postmaster and express agent at a station on defendant's railroad. He was killed by an engine running ahead of the express train, and on the same schedule, at about thirty miles an hour. At that point all persons having business with trains were obliged to cross the track in front of them. The view of the track was obstructed. Deceased, supposing that the train which struck him was the regular train, and would stop, attempted to cross the track. Deceased was a prudent man, and the engineer was very reckless. Held, that a verdict for \$15,000 would not be disturbed. *Chesapeake, etc., R. Co. v. Hendricks* (Tenn.), 443, n.

16. *View obscured — mistaking signals.* Plaintiff's intestate was killed by a train while driving across defendant's track at a public crossing. There were six tracks, and the intestate drove his team, which was gentle, and under his control, at a walk upon the crossing without perceiving any approaching train, though he looked and listened, the view being obscured by cars and buildings. While he was crossing, some men signaled him to stop, but he, misunderstanding the signal, started his team at a trot. They became unmanageable on seeing the approaching train, and he was run over and killed. Held, that the question of contributory negligence was for the jury. *Baltimore, etc., R. Co. v. Walborn* (Ind.), 443, n.

17. *When contributory negligence will not prevent a recovery.* Where the injury to plaintiff is willfully inflicted or is brought about by such gross negligence on the part of the railroad company as to amount to a reckless disregard of human life, it is held that the plaintiff can recover notwithstanding he has been guilty of contributory negligence. *Georgia Pac. Ry. Co. v. O'Shields* (Ga.), 442, n.

18. But mere gross negligence on the part of the company is not sufficient to justify a recovery. *Rowan v. New York, etc., R. Co.* (Conn.), 442, n.

RAILROADS — *Continued.*

ACCIDENTS TO EMPLOYEES.

19. *General duties of company to its employees.* It is the duty of a railroad company to keep its road-bed and track, rolling stock, machinery and appliances in good and safe condition, to cause frequent and thorough inspection of these as can be done consistently with the conduct of its business, for the purpose of discovering any defects that may occur from accidental causes, or the effects of wear and tear or the progress of decay, to exercise care in the selection of its servants and in their retention in its service, and to adopt such rules and regulations as are calculated to guard against accidents, and to make the servants in its employ reasonably safe. *Miller v. Southern Pac. R. Co. (Or.), 1.*

20. *Injury through defective foreign car — liability of company owning car to servants of connecting line.* Where as between connecting lines of railway, the corporations controlling them are mutually bound to transport loaded freight-cars over their respective roads, such duty is necessarily subject to proper rules and regulations, and involve mutual obligations, among which is that of due diligence to provide safe cars for delivery to the servants of the company operating the connecting line to which they are transferred, and who would be exposed to danger from their defective or unsafe condition. *Moon v. Northern Pac. R. Co. (Minn.), 333.*

21. *Duties and liabilities of connecting line receiving and using such car.* The corporation receiving such cars is also subject to liabilities and duties to its servants growing out of the acceptance, possession and subsequent use thereof. But the negligence of the latter does not relieve the former from liability for injuries resulting from its own negligence. *Ibid.*

22. *Defective brake — inspection — negligence.* Where a brake upon a freight-car so transferred by the corporation owning it was out of repair and unsafe for use, and the same had not been inspected with due care before delivery to the servants of a connecting company, and in consequence of such defect a brakeman was injured without fault on his part, held, that an action would lie for the injury against the first-named company. *Ibid.*

23. *Duty and liability of company receiving and using a foreign car.* It is the duty of a railroad company to inspect a freight-car, and to see that it is reasonably fit for service before it is received from another company, and, in the event that a freight-car is received with a brake-beam in such a defective condition that a brakeman, whose duty it is to couple the foreign car with those used by the company receiving it, is injured in his attempt to make such coupling, and the brakeman has no knowledge of the condition of such brake-beam, and its condition cannot be readily seen, the company that employs him and received such car in a defective condition is liable for such injury. *Missouri Pac. Ry. Co. v. Barber (Kans.), 329, n.*

24. It is the duty of the company to ascertain the defect if it can do so by the exercise of reasonable care, and then to decline to receive the car, or to remedy the defect, or to specially caution its employees in regard to the use of the car. The employee will not be deemed guilty of contributory negligence in using the defective car, unless he is aware of the defect or it is of such a character that he ought to have observed it. *380, n.*

25. *Injury to brakeman by projecting rock.* In an action by a brakeman

RAILROADS — ACCIDENTS TO EMPLOYEES — *Continued.*

against a railway company for negligence in allowing a rock to project too far in one of its cuts, an allegation that plaintiff was injured because defendant allowed its road-way to become so "greatly out of repair, unsafe and dangerous" that "by reason thereof the plaintiff, while in the performance of his duties as * * * brakeman, was violently struck against a projecting rock," sufficiently stated the defect relied upon. *Georgia Pac. Ry. Co. v. Davis* (Ala.), 330.

26. *Duty of company as to obstructions near track.* Where it is customary for brakemen in the performance of their duties to ascend and descend from the tops of cars by side-ladders, while the train is in motion, the company is bound to maintain its road-way free from projections which endanger them while so doing. *Ibid.*

27. *Contributory negligence — whether knowledge of defect presumed.* A trainman who has no functions to perform in keeping the road-way in repair is not presumed to have knowledge of such defect, when it has never been imparted to him, but has a right to assume that the road-way is in all respects safe and sufficient for the discharge of his duties. *Ibid.*

28. *Injury to brakeman by obstructions near track — signal-post.* Plaintiff intestate, who had been employed for about two weeks in its yard, where were numerous tracks and constantly moving trains, was killed by coming in contact with a signal-post while ascending the outside ladder of a box-car. The post was four feet from the rail. There was evidence tending to show that the post was too near the cars to be practically safe for operatives, unless aware of the danger. Held that, upon the evidence, the question of defendant's negligence in locating and maintaining the post was for the jury, and also that the court was not warranted in holding, as a matter of law, that the deceased was guilty of contributory negligence in not observing that the post was so near the cars as to be dangerous, and in not appreciating and avoiding the danger. *Johnson v. St. Paul, etc., Ry. Co.* (Minn.), 340, n.

29. It is the duty of a railway company to place its structures and signal-posts at a reasonably safe distance from its tracks so as not to be dangerous to brakemen and other operatives upon the trains, or to warn them of such dangers, if they exist. The employees are not presumed to assume the risk of such perils, in the absence of notice. *Ibid.*

30. *Same — cattle-guard.* Where a brake was so defective as to require one letting it off to stoop down and throw his body beyond the line of the cars, and a brakeman was struck, while so doing, by a cattle-guard negligently placed too near the track, of which he had no notice, he may recover for the injury, though, by continuing in the service with knowledge of the defect in the brake, he had assumed the risk as to it. *Missouri Pac. Ry. Co. v. Somers* (Tex.), 341, n.

31. In such case, if the brakeman continued in the service with knowledge that a number of cattle-guards were too close to the track, he cannot recover, though he did not know the position of the particular one by which he was struck. *Ibid.*

32. *Same — pile of sleepers.* It is negligence to leave a pile of sleepers within eighteen inches of the rails in a switch yard, and, where a brakeman

RAILROADS — ACCIDENTS TO EMPLOYEES — *Continued.*

was injured by such a pile of sleepers, while attempting to get on a moving engine, and he was unaware of its existence, the question of his contributory negligence is for the jury. The questions of negligence and contributory negligence having been properly submitted to the jury, a verdict for the plaintiff was sustained. *Babcock v. Old Colony R. Co.* (Mass.), 841, n.

83. *Injury from failure to establish proper rules — loading lumber.* A railroad company provided proper cars, and the stakes necessary to secure freight on flat-cars, but established no rules for the loading of lumber, except a general one, requiring employes "to attend to the loading of all freight, * * * to see that it is safely stored, and so that it cannot fall off the cars." While one of the company's cars, loaded with lumber without the use of stakes was going a short distance, several sticks fell off, and killed plaintiff's intestate, who was free from contributory negligence. Held, that the failure to establish a rule requiring lumber loaded on flat-cars to be secured in all cases rendered the negligence of those loading the cars imputable to the company, even though they were fellow-servants of deceased. *Ford v. Lake Shore & M. S. Ry. Co.* (N. Y.), 885.

84. *Injury from failure to enforce rules.* In an action against a railroad company for causing the death of a fireman, the evidence showed that the death was caused by a collision between the train on which he was working and an engine standing on the main track in defendant's yard; that there was a rule against leaving engines standing on the main track, but that this rule had been systematically violated for at least a year. Held, that the question of defendant's negligence should have been submitted to the jury, since it was its duty, not only to make prompt rules, but to enforce them. *Whittaker v. Delaware & H. Canal Co.* (N. Y.), 890, n.

85. *Injury while violating rules — contributory negligence.* When the rules of a railroad company require baggage-masters not to leave their car except when necessary, and then only for as short a time as possible, and forbid their riding on the engine, the company is not liable for injuries sustained by a baggage-master while riding on the engine, though the injury was caused by the negligence of an employe of the company. *Louisville, etc., R. Co. v. Wilson* (Tenn.), 890, n.

86. *Rules for protection of car-repairers — sufficiency of.* Where the rules of a railroad company require car-repairers to see that they are protected by a certain flag when under and between cars, and require all employes to acquaint themselves with the rules, and keep a copy of them, and such rules are posted on bulletin boards, and printed on the back of time-tables, and kept for distribution at all points where employes can get them, such rule is sufficient for the protection of a car-repairer working under a car, though it does not expressly prohibit other servants from moving other cars against cars protected by the flag. *Corcoran v. Delaware, etc., R. Co.* (N. Y.), 890, n.

87. *Liability — when accident due to neglect of fellow servant to observe rules.* In an action by a servant against his master for personal injuries caused by the negligence of a fellow-servant, it is proper to instruct the jury that, if defendant failed to exercise reasonable care in providing such rules or usages for the conduct of its business as to afford its servants reasonable means of protection,

RAILROADS — ACCIDENTS TO EMPLOYEES — *Continued.*

and such failure was the cause of the accident, defendant would be liable, unless plaintiff was, by his own negligence, precluded from recovering, but that the plaintiff cannot recover if defendant had provided such rules, and plaintiff was hurt through failure of his fellow-servant to obey the rules. *International, etc., R. Co. v. Hall (Tex.)*, 390, n.

38. In an action for an injury received by plaintiff while at work under a car which was protected by the required flag, caused by the act of a co-servant in moving other cars against it, it is error to refuse to charge that, if the cause of the injury was the act of the co-servant, plaintiff cannot recover. *Corcoran v. Delaware, etc., R. Co. (N. Y.)*, 390, n.

39. Where an engineer started his engine in the night upon hearing part of a verbal order to go ahead, which he misunderstood and erroneously applied to himself, without waiting for the signal required by the rules, and collided with another engine standing on the same track, whereby the fireman on the latter was killed, it was held that the company was not liable, there being no evidence that the absence of proper rules caused the accident. *Peaslee v. Fitchburg R. Co. (Mass.)*, 391, n.

40. *Rules held not to increase liability of employe.* Rules of a railroad company requiring that engineers, when the view is obscured, shall control their engines so that they can stop within range of their vision; that delayed trains must run with great caution; that all trains must approach stations with reduced speed, and that in approaching switches the greatest care must be taken, do not increase the liability of engineers, but simply call their attention to their common-law duty of using due skill and diligence. *Lake Shore, etc., R. Co. v. Parker (Ill.)*, 390, n.

41. *Rules not obligatory upon employes unless known to them.* The rules of a railway company for the government of its employes are not obligatory as such upon those who are not aware of them, and to whom they have not been promulgated. *Central R. Co. v. Rylls (Ga.)*, 391, n.; *Georgia Pac. R. Co. v. Davis (Ga.)*, 390.

ACCIDENTS TO EMPLOYEES IN COUPLING CARS.

42. *Draw-heads of unequal height—failure to furnish suitable links.* A brakeman who has his hand crushed while attempting to couple in the dark two cars with draw-heads, at an unequal height from the track, can recover for his injuries, where the company had failed to furnish suitable links for such couplings, and the conductor ordered plaintiff to take the unsuitable link with which he attempted to make the coupling. *Denver, T. & G. R. Co. v. Simpson (Col.)*, 406.

43. *Foot caught in unblocked switch—knowledge of defect.* In an action against a railroad company for the death of a brakeman, caused by having his foot caught between the rails while uncoupling cars, it is error to charge that decedent's knowledge of the fact that the space between the main and guard-rails was unblocked, was knowledge of the attendant danger, as that is a question for the jury. *Davis v. St. Louis, etc., R. Co. (Ark.)*, 410, n.

44. Notwithstanding the statute requiring all railroad companies to fill or block the frogs, switches and guard-rails, there can be no recovery for the death of a brakeman, who, while voluntarily attempting to uncouple moving

RAILROADS — ACCIDENTS TO EMPLOYEES IN COUPLING CARS — *Continued.*

cars, gets his foot caught in an unblocked "split switch," when it appears that he had been for several years in the employ of the company, was familiar with the switches and track where the accident occurred, had been warned by the written rules of the company, which he had read, not to enter between the cars in motion to couple or uncouple them, and had signed an acknowledgment when he became brakeman that he knew the duties were dangerous, and that he had read the rules by which he would be governed. *Grand v. Michigan Cent. R. Co. (Mich.)*, 410, n.

45. *Foot caught between ties or by rail splinters.* In an action against a railroad company for personal injuries sustained by a car-coupler in its employ, the declaration alleged that, in making a coupling between a standing car and a switch-engine, it became necessary for plaintiff to step between the rails; that, on attempting to follow the backward motion of the cars, he found that his left foot was held either by the cross-ties or the iron rail of the track, causing a car-wheel to run over the foot; that the cross-ties were placed too close together, and the spaces between them were not filled in; that the iron rails were old and worn, and had sharp prongs protruding from the inner edges; and that plaintiff was ignorant of these defects when he started to make the coupling. Held, that the declaration set forth a cause of action, it not affirmatively appearing from its face that plaintiff could have known of the defects in the track by the use of ordinary diligence. *Preston v. Central Railroad & Banking Co. (Ga.)*, 410, n.

46. Plaintiff in attempting to uncouple cars, found the coupling-pin fastened, when he signaled to the engineer to stop the train, which was done. Being still unable to remove the pin, he asked the engineer to give him the slack. The train kept moving slightly, and, after moving along with it for ten or twelve feet, plaintiff succeeded in pulling out the pin, and, as he stepped out, the leg of his pants was caught by a "sliver" in the rail, causing a car-wheel to run over his foot. Held, that a verdict for plaintiff would not be set aside because of his negligence in stepping between moving cars. *Texas, etc., R. Co. v. Overheiser (Tex.)*, 411, n.

47. *Coupling with unsuitable link — contributory negligence.* A brakeman was required to couple cars whose draw-heads were of unequal height and with none but straight links to use, and was injured in so doing. A judgment for plaintiff was affirmed. *Van Gent v. Chicago, etc., R. Co. (Iowa)*, 411, n.; *St. Louis, etc., R. Co. v. Higgins (Ark.)*, 411, n.

48. *Projecting timbers — contributory negligence.* A brakeman was instantly killed while attempting to shackle cars from each of which sticks of lumber projected. It was daylight at the time, and the shackling might have been made safely by stooping down between the timbers, or by crossing over, and making it upon the other side of the car, from which no timber projected. Held, that he was not "in the exercise of due care and diligence at the time," within the meaning of those words as used in the statute, giving a right of action to the next of kin of an employe instantly killed as the result of the negligence of the employer. *Lothrop v. Fitchburg R. Co. (Mass.)* 411, n.

49. *Foreign cars of unusual construction — liability of company using same.* A railroad company is liable to an inexperienced brakeman for injuries re-

RAILROADS — ACCIDENTS TO EMPLOYEES IN COUPLING CARS — *Continued.*

ceived while coupling foreign cars, the injury being caused by the unusual construction of the couplings, materially differing from those of its own cars, unless it has cautioned him against the danger. *Missouri Pac. Ry. Co. v. White* (Tex.), 411, n.

50. So where the foreign car had a defective brake-beam and a brakeman was injured in coupling. *Missouri Pac. Ry. Co. v. Barber* (Kans.), 411, n.

51. *Coupling with hands instead of coupling-sticks.* Plaintiff, in attempting to couple defendant's cars with his hands contrary to the known rules of the company, caught his foot in a hole between the cross-ties, outside the railing, falling forward, just as the cars came together. Held, that plaintiff was guilty of culpable negligence which was the proximate cause of his injury. *Pryor v. Louisville, etc., R. Co.* (Ala.), 411, n.

52. That coupling with the hands, in violation of a rule requiring the use of coupling-sticks, is contributory negligence sufficient to defeat a recovery is also held in *Memphis, etc., R. Co. v. Askew* (Ala.), 412, n.

53. *Coupling to moving train in violation of rules — effect of engineer's order.* Where a brakeman, in violation of the rules of the company, undertakes to make a coupling to a moving train, and is injured, he cannot recover for the injury, and it is immaterial that he was ordered to make the coupling by the engineer of the train. *Railway Co. v. Smith* (Tenn.), 412, n.

54. *Where accident is due to negligence in operating the train or engine.* The fact that there was only one brakeman on a train of ten loaded cars, and that only one brake was applied while it was being let down a steep grade to make the coupling, in doing which plaintiff was injured, was sufficient evidence to go to the jury on the question of defendant's negligence. *Georgia Pac. Ry. v. Propst* (Ala.), 412, n.

55. Defendant's engineer knew that the plaintiff, defendant's brakeman, had no stick to guide the link, that he must couple the cars with his hands, and that the cars were only twelve inches apart. It was within the engineer's power to move the engine back slowly, but he jerked the lever suddenly, causing the engine to "jump back a foot," thereby crushing plaintiff's hand. Held, that plaintiff was entitled to damages although he was guilty of such contributory negligence as would have been, in the absence of the engineer's wanton negligence, a complete defense. *Louisville, etc., R. Co. v. Watson* (Ala.), 412, n.

56. *Conductor making coupling, whether he may recover for injury.* Where, in an action for personal injuries, it appeared that plaintiff, a freight conductor, was injured while uncoupling cars, which was no part of his duty, and contrary to the company's rules, and that there was no pressing emergency for him to perform this duty at that time, it is not error to grant a new trial on the ground that the verdict is contrary to an instruction to find for defendant unless the jury found that there was a pressing emergency. *Kane v. Savannah, etc., R. Co.* (Ga.), 412, n.

CONTRACTS WITH SLEEPING-CAR COMPANY.

57. *Liability for sleeping-car destroyed by fire.* Under a contract between a sleeping-car company and a railroad company, by which the latter assumed responsibility for damage, by "accident or casualty," to drawing-room or

RAILROADS — CONTRACTS WITH SLEEPING-CAR COMPANY — *Continued.*

sleeping-cars used by it under the contract, the railroad company is liable for the loss of such cars by a fire occurring from a cause unknown. *Chicago, St. Louis, etc., R. Co. v. Pullman Southern Car Co. (U. S.), 218.*

58. *Liability of railroad for car destroyed while in its yards — contract construed.* Under the contract, by which the sleeping-car company was to place a designated number of its cars at the disposal of the railroad company, and by which the latter was to become responsible for damages while such cars were on its road, or in its shops undergoing repairs, the railroad company is liable for the destruction by fire of a car which had a few hours before come from active service on the road, and which had been placed in the railroad company's yard for the purpose of being cleaned and resupplied for another trip on the following day. *Ibid.*

59. *Liability for car destroyed in shop of railroad company while undergoing repairs by sleeping-car company.* Where the sleeping-car company became dissatisfied with the manner in which the repairs were made by railroad company, and undertook itself to make such repairs, in a shop set apart to it by the railroad company for that purpose, over which it was given exclusive control, and to which the railroad company's agents had no access, a car which for six months has been undergoing repairs in such repair shop is not in the possession or under the control of the railroad company, and the latter is not liable for its loss by an accidental fire while therein. *Ibid.*

60. *Effect of insurance by sleeping-car company.* The fact that the sleeping-car company had insured the destroyed cars, and has collected the insurance money, does not affect its right to maintain an action on the contract against the railroad company, the policies of insurance providing for an assignment of any claim of the car company to recover for the destruction of the cars, nor will the recovery be limited by the amount collected from the insurance companies, as the excess above a just indemnity will be held by the sleeping-car company in trust for the insurance companies. *Ibid.*

61. *Validity of contract giving sleeping-car company exclusive right to supply railroad with cars.* A stipulation in the contract that the sleeping-car company shall have the exclusive right, for fifteen years, to furnish drawing-room and sleeping-cars for the railroad company's use, does not render the contract void as being in restraint of trade or against public policy, as such stipulation does not disable the sleeping-car company from furnishing cars to rival railroad, and the law will imply, from the terms of the contract, that it must furnish the railroad company in question, not only adequate and safe cars, but sufficient in number for the use of the public travelling on the latter's road. *Ibid.*

HIGHWAY CROSSING.

62. Measure of damages where highway is laid out over right of way. 708, n.

LEGISLATIVE CONTROL.

63. Compelling company to make alterations or construct works for the purpose of promoting the public safety, convenience or welfare. 206, n.; 208, n.; 708, n.

See POLICE POWER.

RAILROADS — *Continued.*

RULES. See RAILROADS, 33-40.

STREET RAILWAYS.

64. *Effect of accepting ordinances without conditions.* A street railway company, by accepting the provisions of a city charter enacted after its organization, and all ordinances then or thereafter passed relative thereto, stands in the same position that it would had such charter and ordinance gone into effect before it was incorporated. *Union Depot R. Co. v. Southern Ry. Co. et al. (Mo.)*, 623.

65. *Right to use tracks of another street railway company — ascertaining compensation.* Article 10, section 6, of the charter of St. Louis provides that "any street railroad company shall have the right to run its cars over the track of any other street railroad company on payment of just compensation for the use thereof, under such rules and regulations as may be prescribed by ordinance; and it shall be the duty of the municipal assembly to immediately pass such ordinances as may be necessary to carry this provision into effect." Held, that an ordinance having been passed giving the right to use tracks, the only thing necessary to perfect the right was to have the "just compensation" ascertained, as provided by ordinance. *Ibid.*

66. *Charter of St. Louis construed as to granting use of tracks of one company by another.* Under said article 10, section 6, of the charter of St. Louis, the city has the power to make rules and regulations, not only for running the cars of one company over the tracks of another, but also for ascertaining the compensation to be paid therefor. *Ibid.*

67. *Whether power of eminent domain involved in such case.* Proceedings under an ordinance providing that when the right to use the tracks of one company has been granted to another company, and the two cannot agree as to compensation, it shall be determined by commissioners appointed by the mayor, do not involve the exercise of the right of eminent domain. *Ibid.*

68. *Cable road — injury to child crossing track — contributory negligence.* Where a child six years old, being about to cross a street on which are two cable tracks, waits until a train on the track nearest him has passed, and then going behind such train, is struck by another train coming from the opposite direction, his failure to see and avoid the train which struck him, and which was probably hidden from his view by the other train, does not constitute contributory negligence. *Chicago City Ry. Co. v. Wilcox (Ill.)*, 672.

See CARRIERS; EMINENT DOMAIN; MASTER AND SERVANT; NEGLIGENCE; POLICE POWER.

SLEEPING-CAR COMPANIES.

See RAILROADS, 56-60.

STOCK AND STOCKHOLDERS.

CREDITORS.

1. Right to enforce payment of subscriptions. 502, n.; 503, n.

2. Right to impeach transactions by which stock is only nominally paid for. 505, n., et seq.

3. Unpaid subscriptions as a trust fund for. 502, n.

STOCK AND STOCKHOLDERS — *Continued.*

PLEDGE OF STOCK.

4. *Right of pledgee to vote stock.* The pledgee of stock in whose name it stands on the corporate records has a right to vote the stock at a meeting to elect directors. In re Argus Printing Co. (N. D.), 182.

5. The pledgor has no right to vote such stock, but a court of equity will, in a proper case, compel the pledgee to give the pledgor a proxy. *Ibid.*

STOCKHOLDERS.

6. *Right to sell stock.* Stockholders have the indisputable and uncontrollable right of disposing, at their pleasure, of their shares in the corporation, and this right is not diminished by the fact that they are directors. *Trisconi v. Winship* (La.), 40.

7. *Right of majority to wind up affairs of corporation.* A majority of the stockholders, whose vote is duly expressed, has the power to determine that the business of the concern shall be stopped altogether, and its affairs liquidated, in the absence of any adverse prohibition or provision in the charter or in the law. *Ibid.*

8. *Powers of the majority over the corporate property and business.* 85, n.

9. *A stockholder is not affected with notice of a resolution of the directors.* In an action against a telegraph company for mistake in transmitting a message, held that the fact that plaintiff was a shareholder in defendant company does not charge him with notice of a resolution of the board of directors that it would not thereafter be liable for mistakes in unrepeatable messages, and it was not error to exclude such resolution when offered in evidence. *Pearsall v. Western Union Tel. Co.* (N. Y.), 62.

STOCKHOLDERS' LIABILITY TO CREDITORS.

10. *Liability upon stock issued for property at an excessive valuation.* The individual defendants organized a corporation with a capital stock of \$250,000, and subscribed for the whole amount. In payment of their subscription they transferred to the company, without actual fraud, a bond for title for land, for which they had paid only \$5,000. For the balance of the purchase-money (about \$50,000) the company executed its notes. The land was worth no more than was paid for it. Held, that under the constitution of Alabama, article 14, section 6, prohibiting the issue of stock except for money or property actually received, and the Code of Alabama 1876, section 1805, requiring all stock subscriptions to be paid in money, or in labor or property at its money value, defendants are liable to creditors of the corporation to the extent of the difference between the value of the property and the amount of the subscription. *Elyton Land Co. v. Birmingham Warehouse & Elevator Co.* (Ala.), 590.

11. *Knowledge of creditor, when presumed.* Plaintiff cannot be presumed to have had knowledge of the manner in which the stock was paid for by the fact that it was the vendor of the land to the individual defendants and took notes for the deferred payments from the defendant corporation. *Ibid.*

12. Stock paid for in property or services fraudulently overvalued is only paid for to the extent of the actual value of such property or services, and the stockholder is liable for the balance to creditors. 519, n.

13. *Liability for unpaid balance when stock is taken at a discount in payment of a debt.* A creditor who, in good faith, takes from an insolvent corporation

STOCK AND STOCKHOLDERS — LIABILITY TO CREDITORS — *Continued.*

its stock, which is wholly worthless, cannot be held liable to other creditors for the difference between the price for which he took the stock and its face value, under Revision Iowa, 1860, title 10, chapter 52, making stockholders of a corporation liable to creditors for the amount of the unpaid installments on the stock owned by them. *Clark v. Bever* (U. S.), 460.

14. Same question considered in note. 512, n.; 516, n.

15. *Bonus stock — liability of holders to creditors.* The stockholders of the corporation, who voted to increase the capital stock eight hundred shares, and then distributed among themselves three hundred of those shares, without any consideration, must, at the suit of creditors of the corporation, which has become insolvent, respond for the par value of the shares, though they never expressly agreed to pay for the same, and though the stock is expressly declared to be fully paid, and free from all claims or demands on the part of the corporation. *Handley v. Stutz* (U. S.), 482.

16. Same subject in note, 513, n.; 479, n.

17. *Liability of those subscribing for bonds and receiving stock as a bonus.* An active corporation for the purpose of paying its debts, and obtaining money to prosecute its business, issued bonds; but, finding it impossible to negotiate them, it issued shares of capital stock in an amount equaling the par value of the bonds as an additional inducement to their purchase. Held, that persons who purchased the bonds and stock at a price fairly representing their market value, without any unfair dealing on the part of any one connected with the transaction, could not be called upon to respond for the par value of the stock, at the suit of the creditors of the corporation. *Handley v. Stutz* (U. S.), 482.

18. *Increased stock, to what creditors holders of, are liable.* Creditors of a corporation are presumed to have trusted it on the faith of an increase in the capital stock from the time it was voted; and the fact that the subscribers did not receive it until after the debts were contracted will not relieve them from liability. *Ibid.*

SUBSCRIPTIONS.

19. *When payable before all stock subscribed.* The articles of association provided that the "capital stock of said corporation shall be \$50,000, of which \$14,500 has been subscribed, * * * and the residue may be issued and disposed of as the board of directors may from time to time order and direct." After the company had begun business defendant subscribed for \$500 of the stock. In an action upon the subscription, held, that the implied condition that no subscriptions were to be paid until the whole capital stock was subscribed, could not arise, and defendant was bound to pay his subscription when called upon for it by the directors. *Arkadelphia Cotton Mills v. Trimble* (Ark.), 286.

20. Subscribers for stock of an incorporated company, whose capital is fixed at a certain sum, whose shares are limited to a certain number, and whose charter provides that payment shall be made as may be determined by the board of directors, cannot be compelled to pay until the whole capital has been subscribed for, and the board has called for payment, unless it is shown that by their acts they have waived their rights in those regards. *Exposition Ry. & Imp. Co. v. Canal St. E. Ry. Co.* (La.), 289, n.

21. *Subscription procured by fraud — relief in equity.* When plaintiff was

STOCK AND STOCKHOLDERS — SUBSCRIPTIONS — *Continued.*

induced to subscribe to the stock of a corporation by fraud, it was held that she could maintain an action in equity to rescind the contract, and recover the price paid in order to relieve her of any further liability arising from her continued relation to the company as stockholder, and she was not, therefore, confined to her legal remedy to recover damages for the fraud practiced on her in the sale of the stock. *Besley v. National Machine Co. (N. Y.)*, 289, n.

22. *Subscriptions to stock of railroad company conditioned upon the completion of part of the road — effect of abandonment of different part.* Where a subscription to stock of a railroad company is payable when the road shall be completed between certain specified points, payment can be enforced when the condition has been complied with, and it is no defense that the entire road has not been completed, or that a part of the route has been abandoned. *Leshner v. Karshner (Ohio)*, 289, n.

23. *Same — effect of delay in compliance.* When notes were given for the balance due on a subscription for stock, payable upon a like condition, and the condition was not complied with for fourteen years, it was held that there could be no recovery, as the delay had been unreasonable. *Blake v. Brown (Iowa)*, 290, n.

24. *Liability to pay for stock, how created.* An express promise to pay for stock unnecessary. 505, n.

25. *Unpaid subscriptions as a trust fund for creditors.* 502, n.

26. *Subscribers to increased stock estopped to deny validity of increase.* Where the charter of the corporation empowers it to increase its capital stock to the precise amount fixed at the stockholders' meeting, subscribers to such increased stock are estopped, as against creditors of the corporation who acted without fault, believing the increase to have been lawfully made, from asserting that the increased issue of stock is invalid because the amendment of the charter authorizing such increase was never recorded or published, as required by General Statutes of Kentucky, chapter 56, sections 5, 6, section 18 of the same chapter further providing that "no persons acting as a corporation under the provisions of this act shall be permitted to set up or rely upon the want of a legal organization as a defense to an action brought against them as a corporation." *Handley v. Stutz (U. S.)*, 483.

27. *Impeaching good faith of subscription — estoppel.* One cannot in a court of equity, for the purpose of having a corporation declared a partnership, raise the point that subscriptions to the stock made by him were not made in good faith. *Bushnell v. Consolidated Ice-Machine Co. et al. (Ill.)*, 527.

UNPAID SUBSCRIPTIONS — "TRUST FUND" DOCTRINE.

28. *Release of unpaid subscriptions to increase of stock.* The original stock of \$10,000 of a corporation was paid for with machinery costing when new \$3,000, subject to a mortgage of \$2,000. A subscriber to three-fourths of an increase of \$20,000 in the capital stock paid therefor in property of questionable value, and gave \$3,500 of his stock to induce a person to subscribe for the other \$5,000 of the stock, and pay \$3,580 in cash on his subscription. Held, that a subsequent release by the corporation of the claim for \$1,470 under an agreement by which such stockholder surrendered his \$3,500 of stock, and took a mortgage for the \$3,580, and another person loaned the corporation

STOCK AND STOCKHOLDERS — UNPAID SUBSCRIPTIONS — *Continued.*

\$1,470, secured by mortgage, was fraudulent and void against a creditor of the corporation. *Carter v. Union Printing Co. et al* (Ark.), 659.

29. *Such release void as to debts existing before new stock authorized.* A fraudulent release by a corporation of an unpaid subscription to an increase in the capital stock of a corporation is void even against a debt arising before the increase. *Ibid.*

30. *Unpaid subscriptions to stock as "trust fund" for creditors.* The doctrine as declared by the courts. 502, n.

31. *Rationale* of the doctrine. 503, n.; 525, n.

32. Power of equity to enforce payment of any balance due on subscriptions. 503, n.

33. Corporation cannot discharge stockholder upon payment of less than par. 505, n.

34. Payment in property or services; right of creditor to impeach the transaction. 510, n.; 519, n.

35. Stock issued in payment of debt, when transaction voidable by creditors. 512, n.; 516, n.; 519, n.

36. Stock issued as a bonus, whether it may be treated as unpaid as respects creditors. 513, n.; 519, n.

37. Agreements made concurrently with subscription for a discharge of the subscriber without full payment. 513, n.

38. Stock paid for in property or services fraudulently overvalued, is only paid for to the extent of the actual value of same. 519, n.

39. The holder of such stock is liable for the balance to creditors. 519, n.

40. What constitutes a fraudulent over-valuation in such case. 511, n.; 512, n.

41. Creditor may waive right to resort to unpaid subscriptions. 524, n.

42. Creditor cannot impeach transaction of which he had notice when debt contracted. 524, n.

43. Liability of transferees of stock issued as fully paid but not so in fact. 522, n.

TRANSFEREES.

44. Liability generally. 522, n.

45. Liability upon stock issued as fully paid but not so in fact. Notice. 523, n.

46. What constitutes one a purchaser in good faith. 523, n.

See CORPORATIONS; DIRECTORS AND OFFICERS.

STREET RAILROADS.

See RAILROADS, 64-69.

STREETS AND HIGHWAYS.

1. *Granting right to use streets for lighting — whether right exclusive.* An ordinance granting an electric light company the right to use the city streets, without making such right exclusive, is a mere license, and is valid. Such grant does not preclude the right to grant like privileges to others, nor debar the city from regulating the use of the streets by general ordinance. *Crowder v. Town of Sullivan* (Ind.), 536.

STREETS AND HIGHWAYS — *Continued.*

2. *Permitting use of street for private purposes.* A municipal corporation cannot, unless specially authorized, grant the use of its streets or public places for any private purpose. 281, n.

See ELECTRICITY; MUNICIPAL CORPORATIONS, 8-15.

SUBSCRIPTIONS.

See STOCK AND STOCKHOLDERS.

TAXATION.

See CONSTITUTIONAL LAW; MUNICIPAL CORPORATIONS, 16.

TELEGRAPH AND TELEPHONE COMPANIES.

1. *Mistake in message — prima facie case.* In an action for the erroneous transmission of a telegraphic message, proof by the plaintiff of the contract, implied by the delivery of the message to be transmitted, and its acceptance by the defendant's agent, and of the breach, makes out a *prima facie* case, and plaintiff need not go further and show any negligent act or omission by defendant. *Pearsall v. Western Union Tel. Co. (N. Y.)*, 62.

2. *Limiting liability — effect of use of blanks — notice.* Defendant showed that for a long time it had used a blank upon which messages were usually written, which contained a printed stipulation limiting its liability for mistakes. Plaintiff admitted that he was familiar with the appearance of the blanks; had frequently written messages on them; that a parcel of them was always lying on the table in his office, but that he had never read the stipulation and had no knowledge of its terms. Held, that in the absence of a showing that the terms of the stipulation were brought home to the plaintiff, it was not error to exclude the blank from the consideration of the jury. *Ibid.*

3. *Stipulation limiting liability does not include failure to send message.* The statement printed on a telegraph blank, that the sender agrees that he will not claim damages for errors or delays or for non-delivery of the message, does not exonerate the company from liability for failing to send the message. *Garrett v. Western Union Tel. Co. (Iowa)*, 665.

4. *Cannot contract for exemption from liability for negligence.* Such a stipulation, in so far as it would operate to exempt the company from liability for the negligence of its operators and agents in sending or delivering the message, is void. *Ibid.*

5. *Stipulation against liability for unrepeatd message.* The stipulation on a telegraphic blank against liability for an unrepeatd message does not protect the company, where such message is negligently delayed in transmission. If such stipulation has any validity at all, it is only in cases of a mistake in transmitting, and then only when the negligence is slight. *Thompson v. Western Union Tel. Co. (N. C.)*, 671, n.

6. *Stipulation requiring claim for damages to be presented within a specified time.* A stipulation upon a telegraphic blank providing that the company shall not be liable in damages, unless it is presented within thirty days from the sending of the message, is reasonable and valid. *Western Union Tel. Co. v. Culberson (Tex.)*, 671, n.

7. *Validity of regulation requiring deposit for delivery outside of free-delivery limits.* A regulation of a telegraph company, printed on blanks, prescribing

TELEGRAPH AND TELEPHONE COMPANIES — *Continued.*

limits within which a message will be delivered free, and requiring a deposit to cover delivery charges if the message is to be delivered outside of the limits, is reasonable; and where the person to whom a message is addressed, lives outside the prescribed limits, it is incumbent on the sender of the message, who knows of the regulations, to ascertain the fact, and make the required deposit, and the illiteracy of the sender is no excuse for his failure to comply with such regulation. *Western Union Tel. Co. v. Henderson (Ala.)*, 571, n.

8. *Whether form of message gives sufficient notice of its importance.* A dealer in cattle living in Iowa wired his Chicago correspondent, "Send me market, Kansas City, to-morrow and next day." He had previously sent and received a great many messages from that office. Held, that it was a question for the jury whether the message charged the company with notice that the sender intended to act upon the result of it in buying or selling cattle at Kansas City. *Garrett v. Western Union Tel. Co. (Iowa)*, 685.

9. *Contributory negligence.* The evidence showed that the sender of the message had an arrangement with his correspondent to the effect that, if there was no change in the market, the correspondent would not answer his telegram, and that on receiving no answer to the telegram the sender bought cattle relying upon the last price that had been sent him, but that he could have ascertained the market-price by other means. Held, that the question of whether he acted in a reasonably prudent manner should have been submitted to the jury, and if he did not he could not recover. *Ibid.*

10. *Message written on plain paper — facts showing no contract to send message.* Mere delivery of a message written on a leaf torn from a blank-book, without any word spoken either by the plaintiff's messenger or the company's operator concerning the sending of the message, and an absence of any payment made or tendered of the price for transmission, is insufficient to create a liability against the company for failure to send such message. *Western Union Tel. Co. v. Liddell (Miss.)*, 671, n.

11. *Cipher dispatch — damages for failure to deliver.* The telegraph company is liable for the damages directly arising from its failure to deliver a message directing plaintiff's brokers to sell a quantity of cotton on his account for delivery at specified times, though the message was in cipher, and the company was not informed of its contents, nor of the fact of plaintiff's prior purchase of the same quantity of cotton to be delivered at the same time. *American Union Tel. Co. v. Daughtry (Ala.)*, 672, n.

12. *Mistake in message — damages — loss of situation.* One P. delivered a message to a telegraph company at its office at Papillion in this state, to be delivered to a person named at Kansas City, Mo. The message as transmitted was incorrect, whereby P. lost a promised situation, and sustained damages. Held, that the company was liable for the damages. *Kemp v. Western Union Tel. Co. (Neb.)*, 672, n.

13. *Mental anguish as an element of damages.* In an action by a father to recover damages for the delay of defendant telegraph company in transmitting a message to a physician, stating that plaintiff's child was very sick, and asking him to come at once, resulting in a delay of twelve hours,

TELEGRAPH AND TELEPHONE COMPANIES — *Continued.*

the mental anguish of the father is an element of damages, but not the sufferings of the child, or those of the other relatives. *Gulf, etc., Tel. Co v. Richardson (Tex.)*, 671, n.

14. *Order to purchase stock — measure of damages.* The proper measure of damages for failure to deliver a telegraphic message containing on its face an instruction to buy a certain stock, that in consequence was not bought until twenty-four hours later, is the difference between the market value of the stock when the message ought to have been delivered and on the day after. *Pearsall v. Western Union Tel. Co. (N. Y.)*, 62.

See ELECTRICITY.

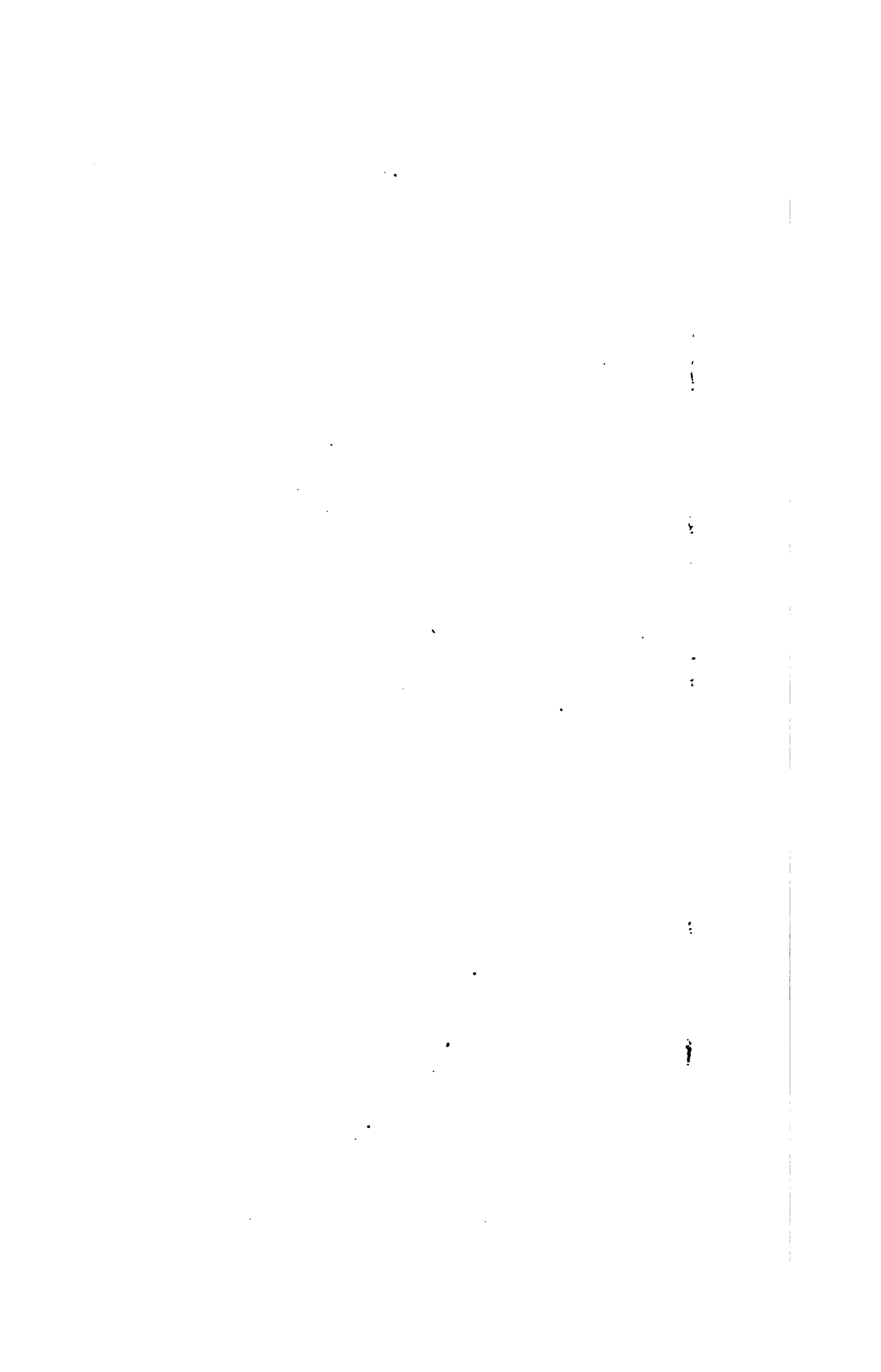
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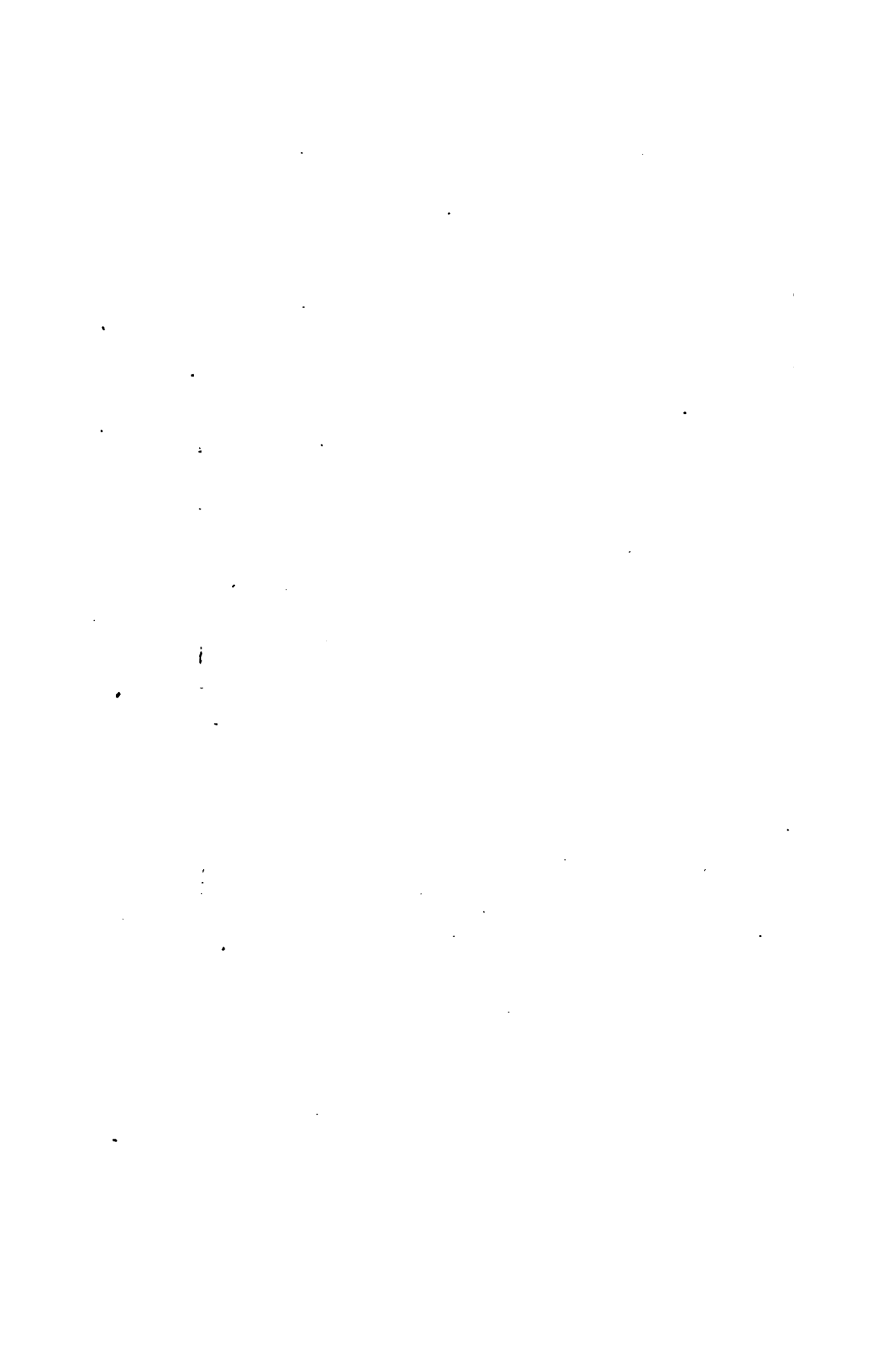
See EMINENT DOMAIN, 45.

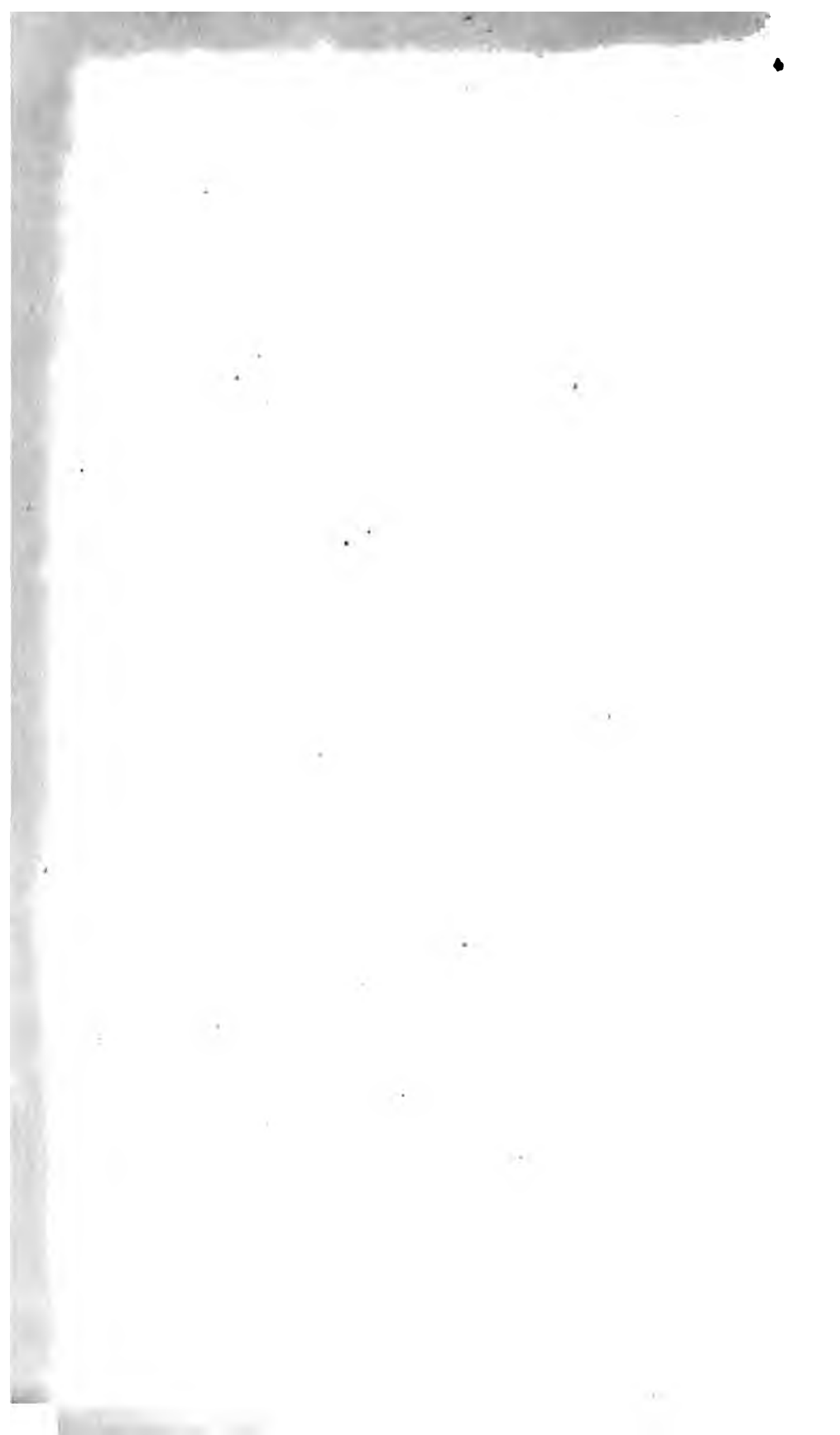
ULTRA VIRES.

1. The objection of *ultra vires* must be made in the trial court or it cannot be availed of in the court of review. 198, n.

See ESTOPPEL.







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